TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 127.

KANSAS CITY WESTERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

GEORGE B. McADOW.

IN ERROR TO THE KANSAS CITY COURT OF APPEALS, STATE OF MISSOURI.

FILED APRIL 13, 1914.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 19, 1915.

a STATE OF MISSOURI, *sct:*

Be it remembered that on the 28th day of April, 1913, there was filed in the office of the Clerk of the Kansas City Court of Appeals a transcript of appeal wherein George B. McAdow was the respondent and The Kansas City Western Railway Company was the appellant, which said transcript was in words and figures as follows, to-wit:

Be it remembered that on the 21st day of the regular January term, 1913, of the Circuit Court of Jackson County, Missouri, at Kansas City, the same being the 5th day of February, 1913, the following proceedings were had and made of record before James H. Slover, Judge of Division 6 in the cause entitled:

No. 63472.

GEORGE B. MCADOW
vs.
THE KANSAS CITY WESTERN RAILWAY COMPANY.

Now again come the said parties and comes also the jury herein; and after the evidence in this cause is concluded, the reading of the instructions of the Court and the arguments of counsel for the respective parties, the said jury retires to consider same, and after due deliberation returns the following verdict, to-wit:

"We the jury find the issues for the plaintiff and assess his damages at $7500*0*.00.

J. H. KENISON, *Foreman.*"

Wherefore it is ordered and adjudged by the Court that the said plaintiff have and recover of and from said defendant the sum of Seven Thousand and Five Hundred Dollars ($7,500.00) with interest thereon from this date at the rate of six per cent per annum together with the costs of this cause and have therefore execution.

28th Day, March Term, 1913.

THURSDAY, April 10, 191–.

No. 63472.

GEORGE B. MCADOW
vs.
THE KANSAS CITY WESTERN RAILWAY COMPANY, a Corporation.

Now defendant's application and affidavit for an appeal, (heretofore filed March 27th, 1913) from the order and judgment of the Court in this cause to the Kansas City Court of Appeals, which said

application is by the Court sustained and appeal allowed to the Kansas City Court of Appeals. Now defendant files appeal bond in the penal sum of Sixteen Thousand Dollars ($16,000) The Kansas City Western Railway Company, as Principal, and Fidelity & Deposit Company of Maryland, as surety thereon, which said bond is by the Court approved.

Now defendant is by the Court given until on or before June 3rd, 1913, in which to file bill of exceptions herein.

STATE OF MISSOURI,
County of Jackson, ss:

I, James B. Shoemaker, Clerk of the Circuit Court, within and for the County and State aforesaid, do hereby certify that the foregoing is a full, true and complete copy of the Judgment and order allowing Appeal in the cause entitled George B. McAdow, Plaintiff, against The Kansas City Western Railway Company, a corporation, defendant, as the same appears of record in my office. In record 603 at Pages 504 and 610.

In witness whereof I hereunto set my hand and affix the seal of said Circuit Court at office in Kansas City this 12th day of April, A. D. 1913.

[SEAL.] (Signed) JAMES B. SHOEMAKER,
By E. G. BUSH, *Deputy.*

And thereafter, to-wit, on the 11th day of November, 1913, the appellant filed its abstract of the record, which said abstract of the record is in words and figures as follows to wit:

b Number 10996.

In the Kansas City Court of Appeals, October Term, A. D. 1913.

GEORGE B. MCADOW, Respondent,
vs.
KANSAS CITY-WESTERN RY. CO., Appellant.

APPELLANT'S ABSTRACT OF THE RECORD.

C. F. Hutchings and McCabe Moore, Attorneys for Appellant.

1 In the Kansas City Court of Appeals, October Term, A. D. 1913.

Number 10996.

GEORGE B. MCADOW, Respondent,
vs.
KANSAS CITY-WESTERN RY. CO., Appellant.

Appellant's Abstract of the Record.

This cause was commenced in the Circuit Court of Jackson County, Missouri, at Kansas City, by the above named George B.

McAdow, filing his original, or first petition on the 8th day of February, A. D. 1912, in which he based his alleged cause of action on the general law of Master and Servant—and not upon any statute, a portion of which petition reads as follows:

"Plaintiff for his cause of action against the defendant above named alleges:

2 That on December 18th, 1911, and for a long time prior thereto he was in the employ of the defendant in the capacity of a motorman, and it was his duty and he was engaged in the work of a motorman, operating electric cars over the tracks of said railway company running from Kansas City, Kansas, to Leavenworth, Kansas, and return; that on said 18th day of December, 1911, at about the hour of 6:30 A. M. of said day, he was operating a car belonging to said defendant known as passenger car No. 21, running in a northerly direction between Kansas City, Kansas, and Leavenworth, Kansas, that when the car which he was at the time operating for the defendant, in obedience to orders and directions of his superior officers, had reached a point about one-half mile south of Wolcott Station, at or near Connor Creek Bridge, another car belonging to the defendant and being operated at the time by the defendant, its agents, servants and employees, moving at the time in an opposite direction, with great speed, collided with the car being operated by the plaintiff, with great force and violence, injuring plaintiff in the manner hereinafter described."

and prays for judgment against said appellant in the sum of twenty-five thousand dollars ($25,000.00); a copy of which said petition is set out in full in this abstract at pages 14 to 17.

On the 18th day of May, A. D. 1912, said George B. McAdow, amended said petition by interlineation, by adding an allegation that said passenger car No. 21 was "maintained" by and was "run over the tracks of said defendant company," a copy of which said amended petition is set out in full in this abstract at pages 21 to 24.

3 On the 16th day of August, A. D. 1912, said George B. McAdow filed another amended petition basing his alleged cause of action only on the statutes of the State of Kansas, one of said statutes being entitled: "An Act relating to the liability of common carriers by railroads to their employees in certain cases, and repealing all acts and parts of acts so far as the same are in conflict herewith," a portion of which petition reads as follows:

"Plaintiff alleges that the cause of action herein stated, accrued to him in the State of Kansas and is governed and controlled by the laws of the State of Kansas; that said cause of action accrued herein on the 18th day of December, 1911, and that he filed his original petition in this cause on the 8th day of February, 1912; that said cause of action is not barred by any statute of limitations of the State of Kansas; that his right of action herein, under and by virtue of the laws of the State of Kansas, is not barred until two years after its accrual; that the law of limitations applying to this cause of action is Section 5610 of the General Statutes of Kansas, 1909, at page 1226." * * *

"Plaintiff pleads the above and foregoing laws of the State of Kansas for the purpose of availing to himself the benefit thereof in this cause of action and bases his cause of action thereon."

A copy of said amended petition filed August 16th, 1912, is set out in full in this abstract at pages 25 to 34.

4 On the 20th day of August, A. D. 1912, at the May term of said Circuit Court, said appellant, with permission of the court and consent of said respondent filed its motion to strike from the files in said cause said amended petition filed as aforesaid, on the 16th day of August, 1912, alleging in said motion that said amended petition was a departure from law to law and set up a new and different cause of action from that stated in all the former petitions in said cause; a copy of which motion is set out in full at page 34 of this abstract.

Without any ruling of the court on said motion said respondent on the 25th day of September, A. D. 1912, with leave of court, filed his second amended petition in said cause basing his alleged cause of action on the acts of Congress of the United States of America, entitled: "An Act Relating to the Liability of Common Carriers by Railroads to their Employees in certain cases," approved April 22, 1908, and an amendment thereto, approved April 5, 1910, commonly known as "The Employers' Liability Act." A copy of said 2nd amended petition is set out in full in this abstract at pages 36 to 41.

On the 3rd day of October, A. D. 1912, said appellant, with leave of said Circuit Court filed its certain motion to strike from the files in said cause said respondent's second amended petition as being a departure from law to law and as alleging a new and different cause of action from that alleged in said respondent's original petition and a different cause of action from that alleged in said respondent's amended petition filed August 16th, 1912; a copy of which motion is set out in full in this abstract at pages 41 to 43.

5 On the 19th day of October, A. D. 1912, at the September term, A. D. 1912, the said motion of appellant to strike from the files said second amended petition of said respondent, was, by the said Circuit Court, in the Assignment Division thereof, the Honorable James E. Goodrich, Judge, presiding, overruled, to which ruling of the court said appellant then and there duly excepted, as is hereinafter fully shown and to which reference is hereby made, and said appellant was thereupon, by the court, given until on or before the 9th day of November, A. D. 1912, in which to present and file its term bill of exceptions.

Afterwards, to-wit, on the 29th day of October, 1912, at the said September term, A. D. 1912, in said assignment division of said Circuit Court, the Honorable James E. Goodrich, Judge presiding, the said appellant, The Kansas City-Western Ry. Co., duly presented to said court and filed its said term bill of exceptions to the acts and rulings of said court in overruling its said motion, filed on the 3rd day of October, A. D. 1912, to strike from the files in said cause said respondent's second amended petition as aforesaid, and prayed

for the allowance and signing of the same as its true term bill of exceptions, to the acts and rulings of said court in overruling its said motion filed on the 3rd day of October, A. D. 1912, as aforesaid, and the said presiding judge of said court, to-wit: The
6 Honorable James E. Goodrich did find the said matters so presented to him to be a true term bill of exceptions on behalf of said appellant and on said 29th day of October, A. D. 1912, did sign and in open court did order the same to be filed and made a part of the record in said cause and during the said term at which such exceptions were taken.

And thereupon, to-wit, on said 29th day of October, A. D. 1912, being the 44th day of the September term, A. D. 1912, of said court, said term bill of exceptions was duly filed by and with the clerk of said circuit court and duly made a part of the record in said cause, and the following further entry of record appears in said cause:

"44th Day of September Term, 1912.

TUESDAY, Oct. 29, 1912.

GEORGE B. MCADOW, Plaintiff,

vs.

THE KANSAS CITY-WESTERN RAILWAY COMPANY, a Corporation, Defendant.

No. 63472.

Now on this day defendant tenders to the court its term bill of exceptions in this cause and the court having examined the same and finding it to be true and correct, said term bill of exceptions is by the court allowed, signed and sealed and it is ordered by the court that said term bill of exceptions be and the same is hereby filed and made a part of the record in this cause.

And defendant now files its answer to plaintiff's second amended petition herein."

7

Answer.

Said answer was and is in words and figures, as follows:

In the Circuit Court of Jackson County, Missouri, at Kansas City, Missouri, September Term, 1912.

No. 63472.

GEORGE B. MCADOW, Plaintiff,

vs.

THE KANSAS CITY-WESTERN RY. CO., Defendant.

Answer.

Now comes said defendant, The Kansas City-Western Ry. Co., and for its answer to said plaintiff's second amended petition denies each and every allegation therein contained.

II.

And for further answer said defendant further states that if said plaintiff was injured in the manner and at the time alleged in his second amended petition, which allegation said defendant expressly denies, it was by virtue of and through his own carelessness, fault and negligence directly contributing thereto, and said defendant did not and has not violated any statute enacted for the safety of its employees.

III.

And for further answer said defendant alleges that said plaintiff at the time and place of his alleged injury on the 18th day of December, A. D. 1911, and for a long time prior thereto was in the employ of said defendant in the capacity of a motorman and was engaged in the work of a motorman operating electric passenger cars of defendant over the tracks of defendant from Kansas
8 City, Kansas, to Leavenworth, Kansas, and return, which said cars were not operated beyond the limits of the State of Kansas by said defendant and the said services of said plaintiff as such motorman were to be performed and were performed wholly within the State of Kansas, and said plaintiff was not employed by defendant to perform any other service; that at said time there was and ever since has been a statute in force of and in the State of Kansas regulating the liability of common carriers by railroad to their employees which said statute contained among others a provision, in words and figures as follows, to-wit:

"SEC. 3. That any action brought against any common carrier, under or by virtue of any of the provisions of this act, to recover damages for injuries to, or the death of any of its employees, such employees shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier, its officers, agents, servants or other employees of any federal or state statute enacted for the safety of employees contributed to the injury or death of such employee."

That any injury complained of in plaintiff's petition that said plaintiff may have received, if any, was not caused or contributed to by the violation by defendant, as a common carrier, its officers, agents, servants or other employees of any Federal or State statute enacted for the safety of employees and said plaintiff assumed all the risks and hazards of his said employment including negligence of his fellow-servants.

9 IV.

And for a further answer said defendant alleges that said plaintiff is not entitled to maintain this action and should not recover anything under his said second amended petition, which is based on Acts of Congress of the United States, because said second amended petition constitutes and is a departure from law to law and alleges a different and further cause of action from that alleged in his original petition in this cause, which was based on a common law

cause of action, and also alleges a different and further cause of action from that alleged in his first amended petition in this cause, which was based on a statute of the State of Kansas.

V.

And for a further answer, said defendant alleges that if plaintiff was injured in the manner and at the time alleged in his second amended petition, which allegation is expressly denied by defendant, then such injury was caused solely or primarily by his own negligence co-operating with the negligence of one A. W. Lowe, a fellow servant of said plaintiff.

C. F. HUTCHINS AND
McCABE MOORE,
Attorneys for said Defendant.

Reply.

The reply to said answer was a general denial.

10 *Additional Record Entries.*

The records of said Circuit Court of Jackson County, Missouri, at Kansas City with reference to this cause also show that on the 3rd day of February, A. D. 1913, at the regular January term, 1913, of said court, said cause came on for trial, before the Honorable J. H. Slover, Judge of Division No. 6 of said Circuit Court and a jury; that said jury, empanelled to try said cause, returned a verdict against said appellant for the sum of $7,500, on the 5th day of February, A. D. 1913, which verdict is hereinafter set out in full, to which reference is hereby made; that thereupon said court rendered and entered judgment against said appellant and in favor of said respondent upon and in accordance with said verdict in the said sum of $7,500; that within four days after the rendition of said verdict and judgment, and during said January term, 1913, of said court, to-wit, on the 8th day of February, A. D. 1913, *of said court*, said appellant filed in said cause its motion for a new trial and affidavit in support thereof, and also filed its motion for arrest of judgment, which motions are hereinafter set out in full to which reference is hereby made; that on the 22nd day of March, A. D. 1913, and during the regular March term, 1913, of said court, said motion for a new trial was overruled by the court to which ruling of said court said appellant then and there duly excepted, and said motion in arrest of judgment was also by said court overruled, to which rulings of said court said appellant then and there duly excepted, which exceptions are hereinafter set out and to which reference is hereby made.

11 The records of said Circuit Court at Kansas City also show with reference to said cause, that on the 27th day of March, A. D. 1913, and during said March term, 1913, of said court, said appellant duly filed its application in said cause, and an affidavit,

for appeal, which are hereinafter set out in full, to which reference is hereby made, which affidavit for appeal was in the usual and statutory form and was by said court approved and was to the effect that the appeal of said appellant prayed for in said cause was not made for vexation or delay but because the affiant believed that said appellant was aggrieved by said verdict of the jury and the judgment and decision of said court rendered in said cause; that said appeal of said appellant was on the 10th day of April, 1913, duly allowed by said court to the Kansas City Court of Appeals and said Circuit Court approved the appeal bond, which was filed by said appellant and said appellant was then and there given, by said Circuit Court, until on or before the 3rd day of June, A. D. 1913, in which to file its bill of exceptions in said cause. The records of said Circuit Court also show with reference to this cause that on the 27th day of May, A. D. 1913, and at the May term, 1913, of said Circuit Court, the said court, for good cause shown, granted and allowed said appellant an extension of time within which to file its bill of exceptions in said cause until on or before the 3rd day of the September term, 1913, of said Circuit Court; that on the 6th day of September, A. D. 1913, and during the May term, 1913, of said court, the bill of exceptions of said appellant, which is here-

12 inafter set out in full, and in which is embodied said term bill of exception, was presented to the said court and was agreed to be true by the parties to said action and was, by the judge of said court signed, and was by the court, by an order duly made and entered of record, duly approved, signed, sealed, filed and made a part of the record in said cause, the said judge then and there being the Honorable Allen C. Southern, who had theretofore been duly and legally appointed by the Governor of the State of Missouri as the successor of the Honorable J. H. Slover, deceased, who had departed this life prior to the said 6th day of September, A. D. 1913.

On said 6th day of September, A. D. 1913, during the said May term, 1913, of said court, said bill of exceptions, in which was incorporated and embodied the term bill of exceptions, was duly filed and made a part of the record in said cause, and the following further entry of record appears in said cause:

"47th Day of May Term, 1913.

SATURDAY, September 6th, 1913.

GEORGE B. MCADOW
vs.
KANSAS CITY-WESTERN RY. CO.

Now defendant presents to the court its bill of exceptions in this cause and the court having examined said bill of exceptions and finding the same to be true and correct, the same is, by the judge of this court signed, sealed and allowed and it is ordered by the court that said bill of exceptions be and the same is hereby filed and made a part of the record in this cause."

13 This cause was brought to this court by filing herein, in due time, on the 28th day of April, 1913, a certified copy of the entry of said judgment in said cause together with the order granting and allowing the said appeal, as required by the Statutes of the State of Missouri.

The said bill of exceptions, above referred to, in which is embodied said term bill of exceptions, is as follows:

In the Circuit Court of Jackson County, Missouri, at Kansas City, Missouri.

No. 63472.

GEORGE B. MCADOW, Plaintiff,
vs.
THE KANSAS CITY-WESTERN RAILWAY COMPANY, a Corporation, Defendant.

Bill of Exceptions.

Be It Remembered, that on the 29th day of October, A. D. 1912, and during the September Term, A. D. 1912, of the Circuit Court of Jackson County, Missouri, at Kansas City in the assignment division thereof, Hon. James E. Goodrich, Judge, present and presiding in said cause, the above named defendant, The Kansas City-Western Ry. Co., presented its Term Bill of Exceptions to the acts and rulings of the said court, said Hon. James E. Goodrich, Judge, presiding, said Term Bill of Exceptions was allowed, filed and made a part of the record in said cause, and is, in words and figures, as follows, to-wit:

14 In the Circuit Court of Jackson County, Missouri, at Kansas City, Missouri, September Term, A. D. 1912.

No. 63472.

GEORGE B. MCADOW, Plaintiff,
vs.
THE KANSAS CITY-WESTERN RAILWAY COMPANY, a Corporation, Defendant.

Term Bill of Exceptions.

Be It Remembered, that on the 8th day of February, A. D. 1912, said plaintiff, George B. McAdow, filed his certain petition in the office of the clerk of this court, which petition is in words and figures as follows, to-wit:

"In the Circuit Court of Jackson County, Missouri, at Kansas City, March Term, 1912.

No. 63472.

GEORGE B. MCADOW, Plaintiff,
vs.
THE KANSAS CITY-WESTERN RAILWAY COMPANY (a Corporation), Defendant.

Petition.

Comes now George B. McAdow, plaintiff above named, and states: That he is now and was at all times herein mentioned a citizen and resident of the State of Kansas; that the said defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Kansas, and is not a citizen corporation of the State of Missouri; that the said defendant is a railway corporation and common carrier of passengers for hire, owning, operating and maintaining a line of electric railway extending from Leavenworth, Kansas, in a southeasterly direction through the town of Wolcott, Kansas, south into and through Kansas City, Kansas, and into Kansas City, Jackson County, Missouri.

"Plaintiff for his cause of action against the defendant above named alleges:

That on December 18th, 1911, and for a long time prior thereto he was in the employ of the defendant in the capacity of a motorman, and it was his duty and he was engaged in the work of a motorman, operating electric cars over the tracks of said railway company running from Kansas City, Kansas, to Leavenworth, Kansas, and return; that on said 18th day of December, 1911, at about the hour of 6:30 a. m. of said day, he was operating a car belonging to said defendant known as passenger car No. 21, running in a northerly direction between Kansas City, Kansas, and Leavenworth, Kansas, that when the car which he was at the time operating for the defendant, in obedience to orders and directions of his superior officers, had reached a point about one-half mile south of Wolcott Station, at or near Connor Creek Bridge, another car belonging to the defendant and being operated at the time by the defendant, its agents, servants and employees, moving at the time in an opposite direction, with great speed, collided with the car being operated by the plaintiff, with great force and violence, injuring plaintiff in the manner hereinafter described.

Plaintiff alleges that at all times herein mentioned he was operating his car in obedience to the orders of defendant, its superintending agents and employees; that at all times herein mentioned he was in the exercise of due care and caution for his own safety, and that the defendant was negligent and careless in not providing the plaintiff with a clear track and in allowing and permitting the car

which he was then operating to be run into and collided with by defendant's car moving in the opposite direction.

16 Plaintiff states that by reason of the collision aforesaid he was injured in the following manner and particulars, to-wit: His back and spinal column was wrenched and sprained, and the ligaments, muscles and tendons in and about his back and spinal column were stretched and loosened; he suffered a fracture of two ribs upon his left side; his breast and ribs upon his left side was bruised and contused; his left shoulder blade was wrenched and displaced; his neck was wrenched and the ligaments and muscles in and about his neck and head were wrenched and loosened; he suffered a severe blow to his head, rendering him dizzy and causing him great pain and constant headaches; his shoulders and chest were wrenched and contused, rendering difficult the movement of his said shoulders and arms; he was injured internally, the nature and extent of which it is impossible more definitely to state; his nervous system was shocked and permanently injured; that he has lost his natural rest and sleep, and by reason of said injuries his general health has been greatly impaired; that he has suffered and will in the future suffer great pain in body and anguish of mind by reason of his said injuries; that all of his injuries so received as aforesaid are permanent and lasting in their character and effect, and were directly caused and occasioned by the negligent and careless acts and omissions of the defendant, its agents, servants and employees as aforesaid, all to plaintiff's damage in the sum of twenty-five thousand dollars.

17 Wherefore plaintiff asks judgment against said defendant for the sum of twenty-five thousand dollars and costs.

ATWOOD & HILL,
By O. S. HILL,
Attorneys for Plaintiff.

(Marked:) Filed Feb. 8, 1912. James B. Shoemaker, Clerk, by J. B. K."

And thereafter to-wit, on the 11th day of March A. D. 1912, being the first day of the March Term, A. D. 1912, of this court in the Assignment Division the said defendant, The Kansas City-Western Ry. Co., was given by the court until the 31st day of March, 1912, in which to plead in said cause.

And thereafter, to-wit, on the 30th day of March, A. D. 1912, being the 18th day of the March Term, 1912, of this court, in the Assignment Division, said defendant, with permission of the court, filed its certain motion herein to quash service of summons on said defendant and sheriff's return thereon in said cause, which motion is in words and figures as follows, to-wit:

In the Circuit Court of Jackson County, Missouri, at Kansas City.

No. 63472.

GEORGE B. MCABOW, Plaintiff,
vs.
THE KANSAS CITY-WESTERN RY. CO., a Corporation, Defendant.

Special Appearance of Said Defendant to Quash Attempted Service of Process and Return Thereof.

Now comes said defendant, The Kansas City-Western Railway Co., specially for the purpose of this motion only, and for no
18 other purpose whatsoever, and moves the court to quash and set aside the attempted service of summons upon said defendant herein and return of such service by the sheriff of Jackson County, Missouri, and for reasons therefor respectfully states:

1. That the said return shows only that said alleged service was obtained by delivering a copy of the writ and petition to Conway Holmes, its president.

2. That said return does not show that said defendant company had no office or place of business in the State of Missouri or in Jackson County, Missouri.

3. That said defendant was at all times herein referred to, ever since has been, and now is a corporation organized under and by virtue of the State of Kansas.

4. That the said return was and is insufficient in law to confer jurisdiction upon the above entitled court over the person of said defendant.

C. F. HUTCHINGS AND
McCABE MOORE,
Attorneys for said Defendant.

(Marked:) Filed Mar. 30, 1912. James B. Shoemaker, Clerk, by W. A. Curry, D. C.

And thereupon, to-wit, on the 20th day of April, 1912, being the 36th day of the March Term, 1912, of this court, in the Assignment Division, thereof, the Sheriff amends his return of the service of process on said defendant and the court gives said defendant until the 30th day of April, A. D. 1912, in which to plead to said plaintiff's petition.

19 And thereafter, to-wit, on the 29th day of April, A. D. 1912, being the 43rd day of the March Term, 1912, of this court, in the Assignment Division thereof, said defendant filed its motion to make said petition of said plaintiff more definite and certain, which motion is in words and figures as follows, to-wit:

In the Circuit Court of Jackson County, Missouri, at Kansas City, March Term, 1912.

No. 63472.

GEORGE B. MCADOW, Plaintiff,
vs.
THE KANSAS CITY-WESTERN RY. CO., Defendant.

Motion to Make Petition More Definite.

Now comes said defendant, above named and moves the court to require said plaintiff to make that part of his petition which reads as follows:

"That the said defendant is a railway corporation and common carrier of passengers for hire owning and operating and maintaining a line of electric railway extending from Leavenworth, Kansas, in a southeasterly direction through the town of Wolcott, Kansas, south into and through Kansas City, Kansas, and into Kansas City, Jackson County, Missouri. * * *

"That on December 18th, 1911, and for a long time prior thereto he was in the employ of the defendant in the capacity of a motorman, operating electric cars over the tracks of said railway company running from Kansas City, Kansas, to Leavenworth, Kansas, and return; that on said 18th day of December, 1911, at about the hour of 6:30 a. m. of said day, he was operating a car belonging to
20 said defendant known as passenger car No. 21, running in a northerly direction between Kansas City, Kansas, and Leavenworth, Kansas,"

more definite and certain by stating:

1. Whether said car No. 21 alleged to have been operated by said plaintiff as aforesaid, was one of the cars operated and maintained by said defendant over its line of electric railway, extending from Leavenworth, Kansas in a southeasterly direction through the town of Wolcott, Kansas, south into and through Kansas City, Kansas, and into Kansas City, Jackson County, Missouri.

2. Whether the tracks of said railway over which said passenger car No. 21 was operated on the 18th day of December, A. D. 1911, at the time of said plaintiff's alleged injury, was a part and parcel of the tracks over which said petition alleges that said defendant was at said time operating, owning and maintaining a line of electric railway extending from Leavenworth, Kansas, in a southeasterly direction through Kansas City, Kansas, and into Kansas City, Missouri.

3. Whether said passenger car No. 21 alleged in said petition to have been operated by said plaintiff as a motorman on said 18th day of December, 1911, over the tracks of said railway company, from Kansas City, Kansas, to Leavenworth, Kansas, and return, was also

operated by any other motorman into Jackson County in the State of Missouri.

C. F. HUTCHINGS AND
McCABE MOORE,
Attorneys for said Defendant.

(Marked:) Filed Apr. 29, 1912. James B. Shoemaker, Clerk, by W. A. Curry, D. C.

21 And, thereafter, to-wit, on the eighteenth day of May, A. D. 1912, being the sixth day of the May term, A. D. 1912, of this court in the assignment division thereof said motion to make plaintiff's petition more definite and certain was by the court sustained as to the grounds alleged therein in paragraphs one (1) and two (2) and overruled as to the balance of said motion.

And, thereafter, to-wit, on said eighteenth day of May, A. D. 1912, said plaintiff amended said petition by interlineation so as to make said petition read in words and figures as follows, to-wit:

In the Circuit Court of Jackson County, Missouri, at Kansas City, March Term, 1912.

No. —.

GEORGE B. McADOW, Plaintiff,
vs.
THE KANSAS CITY-WESTERN RAILWAY COMPANY, a Corporation, Defendant.

Amended Petition.

Comes now George B. McAdow, plaintiff above named and states: That he is now and was at all times herein mentioned a citizen and resident of the State of Kansas; that the said defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Kansas, and is not a citizen corporation of the State of Missouri, that the said defendant is a railway corporation and common carrier of passengers for hire, owning, operating and maintaining a line of electric railway extending from Leavenworth, Kansas, in a southeasterly direction through the town of Wolcott,
22 Kansas, south into and through Kansas City, Kansas, and into Kansas City, Jackson County, Missouri.

Plaintiff for his cause of action against the defendant above named alleges:

That on December 18th, 1911, and for a long time prior thereto he was in the employ of the defendant in the capacity of a motorman, and it was his duty and he was engaged in the work of a motorman, operating electric cars over the tracks of said railway company running from Kansas City, Kansas, to Leavenworth, Kansas, and return; that on said day, he was operating a car belonging to said de-

fendant and maintained by them known as passenger car No. 21, running in a northerly direction between Kansas City, Kansas, and Leavenworth, Kansas, over the tracks of said defendant company; that when the car which he was at the time operating for the defendant, in obedience to orders and directions of his superior officers, had reached a point about one-half mile south of Wolcott Station, at or near Connor Creek bridge, another car belonging to the defendant and being operated at the time by the defendant, its agents, servants and employees, moving at the time in an opposite direction, with great speed, collided with the car being operated by the plaintiff, with great force and violence, injuring plaintiff in the manner hereinafter described.

Plaintiff alleges that at all times herein mentioned he was operating his car in obedience to the orders of defendant, its superintending agents and employes; that at all times herein mentioned
23 he was in the exercise of due care and caution for his own safety and that the defendant was negligent and careless in not providing the plaintiff with a clear track and in allowing and permitting the car which he was then operating to be run into and collided with by defendant's car moving in the opposite direction.

Plaintiff states that by reason of the collision aforesaid he was injured in the following manner and particulars, to-wit:

His back and spinal column was wrenched and sprained, and the ligaments, muscles and tendons in and about his back and spinal column were stretched and loosened; he suffered a fracture of two ribs upon his left side; his breast and ribs upon his left side was bruised and contused; his left shoulder blade was wrenched and displaced; his neck and head were wrenched and loosened; he suffered a severe blow to his head, rendering him dizzy and causing him great pain and constant headaches; his shoulders and chest were wrenched and contused, rendering difficult the movement of his said shoulders and arms; he was injured internally, the nature and extent of which it is impossible more definitely to state; his nervous system was shocked and permanently injured; that he has lost his natural rest and sleep, and by reason of said injuries his general health has been greatly impaired; that he has suffered and will in the future suffer great pain in body and anguish of mind by reason of his said injuries; that all of his injuries so received as aforesaid are permanent and lasting in
24 their character and effect, and were directly caused and occasioned by the negligent and careless acts and omissions of the defendant, its agent, servants and employes as aforesaid, all to plaintiff's damage in the sum of twenty-five thousand dollars.

Wherefore plaintiff asks judgment against said defendant for the sum of twenty-five thousand dollars and costs.

ATWOOD & HILL,
By O. S. HILL,
Attorneys for Plaintiff.

And, thereafter, to-wit on the 21st day of May, A. D. 1912, being the 8th day of the May term of this court, in the assignment division thereof, said defendant, with permission of the court, filed a demurrer

to said petition of said plaintiff, which demurrer was and is in words and figures as follows, to-wit:

In the Circuit Court of Jackson County, Missouri, at Kansas City, March Term, A. D. 1912.

No. 63472.

GEORGE B. MCADOW, Plaintiff,
vs.
THE KANSAS CITY-WESTERN RY. CO., a Corporation, Defendant.

Demurrer.

Now comes the above named defendant, The Kansas City-Western Railway Company, and demurs to said plaintiff's amended petition in said cause and the facts therein alleged, for the reason that said petition does not state facts sufficient to constitute a cause of action against said defendant.

C. F. HUTCHINGS AND
McCABE MOORE,
Attorneys for said Defendant.

(Marked:) Filed May 21, 1912. James B. Shoemaker, Clerk, by W. A. Curry, D. C.

25 And, thereafter, to-wit, on the 27th day of July, A. D. 1912, said demurrer of defendant to said plaintiff's petition was by the court overruled.

And thereafter, to-wit: on the 16th day of August, A. D. 1912, at the May Term, 1912, of this court said plaintiff with permission of the court filed in the Assignment Division of this Court, an amended petition which was and is in words and figures as follows, to-wit:

In the Circuit Court of Jackson County, Missouri, at Kansas City, May Term, 1912.

No. 63472.

GEORGE B. MCADOW, Plaintiff,
vs.
THE KANSAS CITY-WESTERN RY. CO., a Corporation, Defendant.

Amended Petition.

Comes now plaintiff above named, and leave of court being first had and obtained, files herein his amended petition and for his cause of action against the defendant herein states:

That he is now and was at all times herein mentioned a citizen of the State of Kansas; that the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Kansas, and is now incorporated under the laws of the State of Missouri; that the said defendant is a railway corporation and common carrier of passengers for hire, owning, operating and maintaining a line of electric railway extending from Leavenworth, Kansas, in a southeasterly direction into and through the town of Wolcott, Kansas, south into Kansas City, Kansas.

Plaintiff alleges that on December 18th, 1911, and for a
26 long time prior thereto he was in the employ of the defendant company in the capacity of motorman, and it was his duty and he was engaged in the work of a motorman for defendant operating electric cars owned, controlled and operated by the defendant Company over the tracks of said Company running from Kansas City, *Kansas City*, Kansas, to Leavenworth, Kansas, and return; that on said 18th day of December, 1911, at about the hour of six thirty A. M. of said day he was operating a car belonging to the defendant and maintained and operated by it, known as Passenger Car No. 21, running in a northern direction between Kansas City, Kansas, and Leavenworth, Kansas, operated by the defendant over its said tracks.

Plaintiff alleges that when the car which he was at the time operating for the defendant, in obedience to the orders and directions of his superior officers, had reached a point about one-half mile south of Wolcott Station, at or near what is known as "Connors Creek Bridge," another car belonging to the defendant and being at the time operated by the defendant, its agents, servants and employees, moving at the time in an opposite direction with great speed, collided with the car being operated by the plaintiff with great force and violence, injuring plaintiff in the manner hereinafter described.

Plaintiff alleges that at all times herein mentioned he was operating his car in obedience to the orders and directions of the defendant, its superintending agents and employees; that at all times herein mentioned he was in the exercise of due care and caution for his own safety, and that the defendant was negligent and
27 careless in not providing plaintiff with a clear track and in allowing and permitting another car owned, operated and controlled by the defendant and being at the time operated by the defendant, its agents, servants and employees on the same track in an opposite direction, to collide with and run into the car which plaintiff was at the time operating.

"Plaintiff alleges that the cause of action herein stated accrued to him in the State of Kansas and is governed and controlled by the laws of the State of Kansas; that said cause of action accrued herein on the 18th day of December, 1911, and that he filed his original petition in this cause on the 8th day of February, 1912; that said cause of action is not barred by any statute of limitations of the State of Kansas; that his right of action herein, under and by virtue of the laws of the State of Kansas, is not barred until two years after its accrual; that the law of limitations applying to this cause of

action is Section 5610 of the General Statutes of Kansas, 1909, at page 1226," and is in words and figures as follows, to-wit:

"5610. Actions Other than for the Recovery of Real Property. 17. Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:

First. * * *

Second. * * *

Third. * * * Within two years; an action for trespass upon real property, an action for taking, detaining or injuring per-
28 sonal property, including actions for the specific recovery of personal property; an action for injury to the rights of another not arising on contract, and not hereinafter enumerated; an action for relief on the ground of fraud—the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud." * * *

Plaintiff alleges that by the provision of the law of the State of Kansas above set forth he brought his action herein within the time allowed by the Statute of limitations of said state.

Plaintiff alleges that the cause of action herein was commenced within eight months of the time of his injury when said cause of action accrued to him, which said time is within the statutory requirements of the laws — the State of Kansas governing the giving of notice in actions of this kind; that said law of the State of Kansas is to be found in the General Statutes of Kansas, 1909, at page 1490, the same being Section 6999, and is in words and figures as follows, to-wit:

"6999. To Employe: Notice. 22. Every railroad company organized or doing business in the State of Kansas shall be liable for all damages done to any employe of said company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employes, to any person sustaining such damage: Provided, that notice in writing that an injury has been sustained, stating the time and place thereof, shall have been given by or on behalf of the person injured, to such railroad company
29 within eight months after the occurrence of the injury: Provided, however, that where an action is commenced by the injured person within said eight months, it shall not be necessary to file said notice: And provided further, that where any person injured is in the hospital of or under the charge of the railroad company causing the injury or is prevented by the effects of said injury, the said eight months shall not begin to run until such injured person is discharged from said hospital or care of said railroad company, or until such disability be removed: Provided further, that in case said injured person shall die as a result of said injuries, within said eight months, it shall not be necessary to give said notice, Provided further, that said notice need not state whether or not suit is intended to be brought."

Plaintiff alleges that said law of the State of Kansas was in full force and effect at the time of said injury to plaintiff and that plain-

tiff has complied with said statutory requirement by bringing his action within the eight months after the occurrence of his injury.

Plaintiff alleges that there was at the time of his injury and now is in full force and effect a law of the State of Kansas, duly enacted by the Legislature of said State, which applies to employes of railroad companies such as the Railway Company herein mentioned and employes such as plaintiff working for said railroad companies, which governs and controls the liability of said railway company for injury to its employes occurring in certain cases, such as the injury
30 which occurred to plaintiff, said law and legislative enactment of the State of Kansas being House Bill No. 240, entitled "An Act relating to the liability of common carriers by railroads to their employes in certain cases, and repealing all acts and parts of acts so far as the same are in conflict herewith," said law being fully set forth in the Session Laws of Kansas, 1911, at page 437 thereof, which reads as follows, to-wit:

SECTION 1. That every company, corporation, receiver or other person operating any railroad in this state shall be liable in damages to any person suffering injury while he is employed by such carrier operating such railroad or in case of the death of such employe, to his or her personal representative for the benefit of the surviving widow and children, or husband and children or mother or father of the deceased, and if none, then the next of kin, dependent upon such employe for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier; or by reason of any insufficiency of clearance of obstructions, of strength of road bed and tracks or structure, of machinery and equipment, of lights and signals, or rules and regulations and of number of employees to perform the particular duties with safety to themselves and their co-employees, or of any other insufficiency, or by reason of any defect which defect is due to the negligence of said employer, its officers, agents, servants or other employees in its cars, engines, motors, appliances, machinery, track, roadbed, boats, works, wharves or other equipment.

31 SECTION 2. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employe, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee, provided, that no employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier, its officers, agents, servants or other employees of any federal or state statute enacted for the safety of employees contributed to the injury or death of such employee.

SECTION 3. That any action brought against any common carrier, under or by virtue of any of the provisions of this act, to recover damages for injuries to, or the death of any of its employees, such employees shall not be held to have assumed the risk of his employ-

ment in any case where the violation by such common carrier, its officers, agents, servants or other employees of any federal or state statute enacted for the safety of employees contributed to the injury or death of such employee.

SECTION 4. That any contract, rule, regulation or devise whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act,
32 shall to that extent be void; provided, that in any action brought against any common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum contributed or paid to any insurance, relief, benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

SECTION 5. That any right of action given by this act to a person suffering injury shall survive to his or her personal representatives, for the benefit of those entitled to recover under this act, but in such cases there shall be only one recovery for the same injury.

SEC. 6. That all acts or parts of acts so far as the same are in conflict herewith are hereby repealed.

SEC. 7. This act shall be in force and take effect from and after its publication in the statute book."

"Plaintiff pleads the above and foregoing laws of the State of Kansas for the purpose of availing to himself the benefit thereof in this cause of action and bases his cause of action thereon."

Plaintiff alleges that the defendant's acts in not providing him with a safe track and in suffering and permitting another car of the defendant to run into and collide with him in the manner aforesaid is contrary to and in violation of the statutory provisions above set forth.

Plaintiff alleges that by reason of the collision aforesaid he was injured in the following manner and particulars, to-wit:

33 His back and spinal column were wrenched and sprained, and the ligaments, muscles and tendons in and about his back and spinal column were stretched and loosened; he suffered a fracture of two ribs upon his left side; his breast and ribs upon his left side were bruised and contused; his left shoulder blade was wrenched and displaced; his neck was wrenched and the ligaments and muscles in and about his neck and head were wrenched and loosened; he suffered a severe blow to his head, rendering him dizzy and causing him great pain and constant headaches; his shoulders and chest were wrenched and contused, rendering difficult the movement of his said shoulders and arms; he was injured internally the exact nature and extent of which it is impossible more definitely to state; his nervous system was shocked and permanently injured; that he has lost his natural rest and sleep and by reason of said injuries his general health has been greatly impaired; that he has suffered and will in the future suffer great pain in body and anguish of mind by reason of his said injuries; that at the time of said injury plaintiff was earning the sum of eighty-five dollars per month as motorman for defendant; that since said injury and as a result

thereof he has been unable to work and earn a livelihood, and will in the future be unable to earn a livelihood, by reason of said injuries; that all of said injuries so received as aforesaid are permanent and lasting in their character and effect, and were directly caused and occasioned by the negligent and careless acts and omissions of the defendant, its agents, servants and employees, as aforesaid, all to plaintiff's damage in the sum of twenty-five thousand dollars.

34 Wherefore, plaintiff asks judgment against said defendant for the sum of twenty-five thousand dollars and costs.

ATWOOD & HILL,
By O. S. HILL,
Attorneys for Plaintiff.

Received a copy of the above and foregoing this — day of August, 1912.

(Marked:) Filed Aug. 16, 1912, James B. Shoemaker, Clerk, By Grover Joyce, D. C.

And thereafter, to-wit: on the 20th day of August, A. D., 1912, at the May Term, 1912, of this court, in the Assignment Division thereof, said defendant, with permission of the court and consent of said plaintiff filed its motion to strike from the files in said cause, said amended petition of said plaintiff, filed as aforesaid on the 16th day of Aug. A. D. 1912, which motion of defendant was and is in words and figures, as follows:

In the Circuit Court of Jackson County, Missouri, at Kansas City, Missouri, May Term, 1912.

No. 63472.

GEORGE B. MCADOW, Plaintiff,
vs.
THE KANSAS CITY-WESTERN RY. CO., a Corporation, Defendant.

Motion to Strike from the Files Amended Petition of said Plaintiff in said Cause.

Now comes the above named defendant, The Kansas City-Western Ry. Co., and moves the court to strike the amended petition of said plaintiff filed on the 16th day of August, 1912, from the files in said cause for the reasons that the same constitutes and is a

35 departure from law to law, and sets up a new and different cause of action from that stated in all of the former petitions in said cause, in this, to-wit: The original petition of said plaintiff and all of the former amended petitions of said plaintiff in said cause stated an alleged cause of action alleged to have resulted from the general law of master and servant and were not basing (or attempting to base) a suit to enforce an exceptional right given by

the law of the state of Kansas, and all of said former petitions of said plaintiff in said cause were based upon the general law of master and servant without referring to any statute while the amended petition of said plaintiff in said cause, to which this motion is aimed, asserts a new and different alleged cause of action from those stated in any former petition in said cause and bases an alleged cause of action solely on the statutes of the State of Kansas referred to and pleaded in said amended petition last above referred to, and said plaintiff has therefore departed from an alleged cause of action based upon the general law of master and servant and now seeks to recover in said cause, of said defendant, upon another and different cause of action based solely upon said statutes of Kansas above referred — and pleaded in the said amended petition of said plaintiff in this cause, filed the 16th day of August, 1912, as aforesaid, and is therefore a departure from law to law.

C. F. HUTCHINGS AND
McCABE MOORE,
Attorneys for Defendant.

36 Copy of the above motion received by the undersigned who consents to the filing of the original this 20th day of August, 1912.

ATWOOD & HILL,
W. E. P.,
Attorneys for Above Named Plaintiff.

(Marked:) Filed Aug. 20, 1912, James B. Shoemaker, Clerk, By Grover Joyce, D. C.

And thereafter, to-wit, on the 25th day of Sept. A. D. 1912, at the September Term, 1912, of this Court, in the Assignment Division thereof, Honorable James E. Goodrich, Judge, presiding, the said plaintiff with leave of court, filed his second amended petition in said cause, which was and is in words and figures as follows, to-wit:

In the Circuit Court of Jackson County, Missouri, at Kansas City, September Term, 1912.

No. 63472.

GEORGE B. McADOW, Plaintiff,
vs.
THE KANSAS CITY WESTERN RAILWAY CO., a Corporation, Defendant.

Second Amended Petition.

Comes now George B. McAdow, plaintiff above named and leave of court being first had and obtained files herein his second amended petition, and for his further cause of action against the defendant herein, states:

That he is now and was at all times herein mentioned a citizen of the State of Kansas; that the defendant is a corporation, duly organized and existing under and by virtue of the laws of the State of Kansas, and is not incorporated under the laws of the State of Missouri; that the said defendant is a railway corporation
37 and common carrier of passengers and goods for hire, owning, operating and maintaining a single track line of electric railway, extending from Leavenworth, Kansas, in a southeasterly direction into and through the town of Wolcott, Kansas, south into and through Kansas City, Kansas *City*, and into Kansas City, Missouri.

Plaintiff alleges that at all times herein mentioned the defendant for hire transported goods and passengers over its line of railway from Leavenworth, Kansas, to Kansas City, Missouri, and operated its cars over its own lines and those of the Metropolitan Street Railway Company, a railway company, owning, operating and maintaining lines of railway, and engaged in the business of carrying passengers for hire over its various lines located in Kansas City, Kansas, and Kansas City, Missouri, and elsewhere; that the defendant operates its cars from Leavenworth, Kansas, into Kansas City, Kansas, and across into Kansas City, Missouri, and back to Leavenworth, Kansas, on an hourly schedule, and daily transports over its own lines and the lines of the Metropolitan Street Railway Company, with which it has a traffic arrangement whereby the defendant's cars are transported over certain of said Metropolitan lines in Kansas City, Kansas, and Kansas City, Missouri.

Plaintiff alleges that at the time of the happening of the injury to him as hereinafter set forth and for a long time prior thereto he was in the employ of the defendant in the capacity of a motorman, and was engaged in the work of operating a car owned, controlled and under the management and supervision of the defend-
38 ant, making round trip journeys from Leavenworth, Kansas, to Kansas City, Missouri; that as such motorman he was at said times engaged in the work of operating the cars of the defendant, transporting passengers and goods between Kansas City, Missouri, and Leavenworth, Kansas, and other points on defendant's line of railway.

Plaintiff alleges that on December 18th, 1911, he was engaged in operating a car owned by the defendant over its line of railway aforesaid, known as "car No. 21," which left Kansas City, Missouri, about 6:05 A. M. of said day en route for Leavenworth, Kansas.

Plaintiff alleges that when the car which he was at said time operating for the defendant in obedience to the orders and directions of his superior officers, had reached a point about one-half mile south of Wolcott Station, Kansas, at or near what is known as "Connor's Creek Bridge," another car belonging to the defendant and being at the time operated by the defendant, its agents, servants and employees, moving at the time in an opposite direction with great speed and force, struck and collided with the car operated by the plaintiff with great force and violence, injuring plaintiff in the manner hereinafter described.

Plaintiff alleges that at all times herein mentioned he was operating his car in obedience to the orders and directions of the defendant, its superintending agents and employees, and at all times herein mentioned he was in the exercise of due care and caution for his own safety; that the defendant was negligent and careless in not providing plaintiff with a clear track, and in allowing
39 and permitting another car, then owned and being operated and controlled by the defendant, its agents, servants and employees on the same track and going in an opposite direction, so as to collide with and run into the car which plaintiff was at the time operating.

Plaintiff alleges that the car which he was at the time operating had a large number of passengers on the same, who had boarded said car in Kansas City, Missouri, and were being transported in said car, operated by plaintiff, from Kansas City, Missouri, to various stations on the line of the defendant railway company in the State of Kansas; that by reason of the foregoing facts the defendant was engaged in the business of an interstate carrier of passengers and goods between the State of Missouri and the State of Kansas, and plaintiff was at all times herein mentioned engaged in the business of a motorman for the defendant in the carrying on of its business between said states of Missouri and Kansas, and the said negligent and careless acts and omissions of the defendant, it- agents, servants and employees were in violation of the acts of Congress governing and controlling actions for injuries received by servants of railroad companies, such as plaintiff, while engaged in interstate commerce, in which the defendant herein was engaged.

Plaintiff alleges that by reason of the collision aforesaid he was injured in the following manner and particulars, to-wit:

His back and spinal column were wrenched and sprained, and the ligaments, muscles and tendons in and about his back and
40 spinal column were stretched and loosened; he suffered a fracture of his ribs upon his left side; his breast and ribs upon his left side were bruised and contused; his left shoulder blade was wrenched and displaced; his neck was wrenched and the ligaments and muscles in and about his neck and head were wrenched and loosened; he suffered a severe blow to his head, rendering him dizzy and causing him great pain and constant headaches; his shoulders and chest were wrenched and contused, rendering difficult the movement of his said shoulders and arms, he was injured internally and externally, the exact nature and extent of which it is impossible more definitely to state; his nervous system was shocked and permanently injured; that he has lost his natural rest and sleep and by reason of said injuries his general health has been greatly impaired and his senses of sight and hearing have been permanently impaired; that he has suffered and will in the future suffer great pain in body and anguish of mind by reason of his said injuries; that at the time of said injury plaintiff was earning the sum of eighty-five dollars per month as motorman for defendant; that since said injury and as a result thereof he has been unable to work and earn a livelihood and will in the future be unable to earn a livelihood by reason

of said injuries; that all of said injuries so received as aforesaid are permanent and lasting in their character and effect, and were directly caused and occasioned by the negligent and careless acts and omissions of the defendant, its agents, servants and employees, as aforesaid, all to plaintiff's damage in the sum of twenty-five thousand dollars.

41 Wherefore, plaintiff asks judgment against the said defendant for the sum of twenty-five thousand dollars and costs.

ATWOOD & HILL,
By O. S. HILL,
Attorneys for Plaintiff.

(Marked:) Filed Sept. 25, 1912. James B. Shoemaker, Clerk, by W. A. Curry, D. C.

And thereafter, to-wit: on the 3rd day of Oct. A. D. 1912, at the September Term, 1912, of this court, in the Assignment division thereof, Honorable James E. Goodrich, Judge, presiding, the said defendant, with leave of court, filed its certain motion to strike from the files in said cause, said plaintiff's second amended petition as being a departure from law to law and alleges a new and different cause of action from that alleged in said plaintiff's original petition and a different cause of action from that alleged in said plaintiff's first amended petition which said motion of defendant was and is in words and figures as follows, to-wit:

"In the Circuit Court of Jackson County, at Kansas City, Missouri.

No. 63472.

GEORGE B. MCADOW, Plaintiff,
vs.
THE KANSAS CITY-WESTERN RY. CO., Defendant.

Motion to Strike from the Files the Second Amended Petition in said Cause.

Now comes the above named defendant, the Kansas City Western Ry. Co., and moves the court to strike the second amended petition of said plaintiff from the files in said cause for the reason

42 that the same constitutes and is a departure from law to law, and sets up another and different and (as said second amended petition expressly alleges) a "further cause of action against the defendant herein," from that stated in his first amended petition, in this, to-wit: That the first amended petition asserts an alleged cause of action based solely on the statutes of the State of Kansas, referred to and pleaded in said first amended petition to enforce a right given by the laws of the State of Kansas, to-wit: Sec. 6999 of the General Statutes of the State of Kansas, A. D. 1909, page 1490, and another legislative enactment of the State of Kansas, being House Bill No. 346, Entitled "An Act Relating to the Lia-

bility of Common Carriers by Railroads to their Employees, in certain cases and repealing all acts and parts of acts so far as the same are in conflict herewith," said statute of Kansas being fully set forth in the Session Laws of Kansas, A. D. 1911, at page 547, and pleaded in full in said first amended petition, which first amended petition also contains the following allegation:

"Plaintiff pleads the above and foregoing laws of the State of Kansas for the purpose of availing to himself the benefit thereof in this cause of action and bases his cause of action thereon."

And said second amended petition in this cause to which this motion is directed and aimed, asserts a "further" and different alleged cause of action from that stated in his first petition and bases an al-

leged cause of action arising solely under the provisions of an
43 act of Congress of the United States of America, entitled "An Act Relating to the Liability of Common Carriers by Railroads to their Employees in certain cases" approved April 22nd, 1908, and an amendment thereto approved April 5th, 1910, commonly called "The Employers' Liability Act," which acts of Congress of the United States supersedes and renders inoperative the said statutes of the State of Kansas referred to and pleaded in said plaintiff's first amended petition, and said plaintiff has therefore departed from an alleged cause or causes of action in his first amended petition based solely on the said statutes of the State of Kansas and now seeks to recover in this same cause upon another and different cause of action based solely on said act of Congress of the United States, above referred to, and said second amended petition of said plaintiff, therefore, constitutes and is a departure from law to law.

C. F. HUTCHINGS AND
McCABE MOORE,
Attorneys for said Def't.

(Marked:) Filed Oct. 3, 1912, James B. Shoemaker, Clerk, by W. A. Curry, D. C.

And thereafter, to-wit: On the 19th day of October, A. D. 1912, at the September Term, 1912, of this court in the assignment division thereof the Honorable James E. Goodrich, Judge, presiding, the said motion, of said defendant filed October 3, 1912, as aforesaid, to strike from the files in said cause said plaintiff's second amended

petition, was by the court overruled to which ruling of the
44 court said defendant then and there at the time duly excepted, and said defendant was thereupon, by the court given until on or before the 9th day of November, A. D. 1912, in which to present and file its term bill of exceptions herein.

Comes now said defendant, The Kansas City-Western Ry. Co., by its attorneys of record herein and present the foregoing to the Honorable James E. Goodrich, Judge of this Court and prays him to allow and sign the same as its true term bill of exceptions to the acts and rulings of the court hereinbefore recited.

C. F. HUTCHINGS AND
McCABE MOORE,
Attorneys for said Defendant.

Now therefore, the undersigned, Judge of the Circuit Court, before whom the proceedings hereinbefore set forth and excepted to, were had, being fully advised in the premises, doth find the foregoing to be a true term bill of exceptions on behalf of said defendant, The Kansas City-Western Ry. Co., and doth sign and in open court doth order that the same be filed and made a part of the record in said cause, this 29th day of October, A. D. 1912, and during the term at which such exceptions were taken.

JAMES E. GOODRICH,
Judge of the Circuit Court of Jackson County, Missouri, in Division No. Five.

"O. K." 10/29/12.

ATWOOD & HILL,
Attorneys for Plaintiff.

Filed Oct. 29th, 1912. James B. Shoemaker, Clerk. By W. A. Curry, D. C.

45 And thereupon, to-wit: on said 29th day of October, A. D. 1912, being the 44th day of the September Term, A. D. 1912, of said court, the following further entry of record appears in said cause:

"44th Day of September Term, 1912.

TUESDAY, Oct. 29, 1912.

No. 63472.

GEORGE B. MCADOW, Plaintiff,
vs.
THE KANSAS CITY-WESTERN RAILWAY COMPANY, a Corporation, Defendant.

Now on this day defendant tendered to the court its term bill of exceptions in this cause and the court having examined the same and finding it to be true and correct, said term bill of exceptions is by the court allowed, signed and sealed and it is ordered by the court that said term bill of exceptions be and the same is hereby filed and made a part of the record in this cause.

And defendant now files its answer to plaintiff's second amended petition herein."

And Be it remembered, that thereafter said cause coming on for trial at the regular January Term, 1913, of the Circuit Court of Jackson County, Missouri, at Kansas City—and on the 3rd day of February, 1913, before Hon. J. H. Slover, Judge of Division No. 6 of said Court, and a jury—the following proceedings were had:

The plaintiff, to sustain the issues upon his part, offered and introduced evidence as follows:

46 JOHN M. EGAN, having been duly sworn as a witness for the plaintiff, testified as follows:

Direct examination by Mr. ATWOOD:

Q. State your name, Mr. Egan?
A. John M. Egan.
Q. What connection have you with the management of the Metropolitan Street Railway, which is now in the hands of the receivers?
A. General Manager for the receivers.
Q. The railroad is in the hands of receivers of the Federal Court?
A. Yes, sir.
Q. Mr. Ford Harvey and Mr. Dunham?
A. Yes, sir.
Q. You are acting as their manager?
A. Yes, sir.
Q. When did it go in the hands of the receivers?
A. June 3rd, 1911.
Q. Tell the jury, if you will, whether or not there is any contract that you operate under, the cars of the Kansas City Western over your line?
A. There is no contract.
Q. How do you divide, if you do divide at all, the money that is taken by your conductors that you have on the cars?
A. Our conductor is placed on the car when it comes onto our tracks.

Mr. COWHERD: I would like to ask him a question before going into the question orally as to this matter in regard to a written contract. Our understanding is that there was a written contract between the Metropolitan Street Railway Company and the
47 Kansas City Western and that these matters are all regulated by that written contract.

By Mr. COWHERD:

Q. Did you say there was no written contract, or do you mean there is none between the receivers?
A. Between the receivers there is none.
Q. There was a written contract between the Metropolitan and the Kansas City Western, wasn't there?
A. There was, sir.
Q. Nothing has been done to set aside that contract other than simply the company has gone into the hands of receivers?
A. I am informed by counsel not to recognize the contract.
Q. I don't want to know what the counsel told you about it. There was a written contract between the Metropolitan Company and the Kansas City Western Company, wasn't there?
A. Yes, sir.
Q. Under that written contract these cars were operated up until the time the company went into the hands of receivers?
A. Yes, sir.

Q. And you don't know of any change in regard to the contract from that time?

A. I don't know of any change. I don't know of any contract.

Mr. COWHERD: We submit there is a written contract that governs the terms and relations of these parties, and that that is the best evidence.

Mr. ATWOOD: These cars were operated at the time of the injury by the receivers and in order to be efficacious in this case or binding in this case it must have been a contract recognized by the
48 people that were operating the cars at the time of the accident, and not a contract existing between somebody other than the people who were operating the car at the time of the accident. Now, we have it from the witness that in the month of June, 1911, the control and domination of the Metropolitan Company passed from the officers of the company to the receivers, and that the receivers then appointed Mr. Egan as their manager.

Mr. COWHERD: We offer to show by this witness that he was president of the Metropolitan Street Railway Company at the time the road went into the hands of the receivers; that there was a written contract between that road and the Kansas City Western providing for the method of handling these cars over the lines of the Metropolitan, and that the cars were handled before the receivership exactly as they were handled since the receivership, and we submit that the mere fact that the road went into the hands of receivers does not abrogate the contract which existed at that time, and the fact that it has been handled practically the same way since, shows that the parties have treated it as an existing contract, and we submit that the contract is the best evidence of its terms.

By Mr. COWHERD:

Q. Was this contract you referred to between the Metropolitan and the Kansas City Western Railway Company a written contract?

A. It was.

Q. Now, have the cars been operated since the receivership as they were before the receivership?

A. Practically so.

49 By Mr. ATWOOD:

Q. You mean the movement of the cars over the rails?

A. Yes, sir.

Q. How about the payment of money, have they been the same by the receivers as they were before?

A. There has been no payment of money since the receivership to the motormen.

Q. That is the motormen of the Kansas City Western?

A. Yes, sir.

By Mr. COWHERD:

Q. Bills have been sent each month just as they were before?

A. Yes, sir.

Q. Simply the receivers have not paid them?
A. Yes, sir.

By Mr. ATWOOD:

Q. Have you acknowledged or recognized these bills, or have you been informed by your counsel that you should not recognize them?

Mr. COWHERD: Objected to as incompetent and irrelevant. We object for the reason that this is a question for the court and not for the witness to pass upon whether these bills were properly sent, or whether the company was responsible under the contract for the wages of the men operating the road. We object further, that what he has been informed by counsel would be hearsay and incompetent.

A. I have been informed by counsel not to recognize them.
Q. That is the general attorneys for the receivers of the road that are now operating the road?
A. Yes, sir.

50 Mr. COWHERD: The same objection.
The COURT: The objection is by the court overruled.
To which ruling of the Court the defendant then and there duly excepted.

Q. In the month of December, 1911, did you hire McAdow, or was he under your control or hire?
A. No, sir.

Mr. COWHERD: That there may be no mistake, we want it understood that all of this testimony is objected to for the reason that the relations between the Metropolitan Street Railway Company and the defendant company in this case or the receivers of the Metropolitan and the defendant company are shown fully by the written contract that existed between the Metropolitan and the defendant. The receivers have operated under the public laws of Kansas City, Missouri, of which this court takes judicial notice, and the written contract is the best evidence, and the oral testimony of this witness is incompetent.
Mr. ATWOOD: I am not asking about the contract at all.
Mr. COWHERD: It is a question under the contract as to who was the employer.
The COURT: The accident occurred after the receivers were appointed?
Mr. ATWOOD: Yes, sir.

Q. Did you hire McAdow?
A. I did not.
Q. Did you ever hire him?
A. Not that I know of.

51 Mr. COWHERD: The court did not rule upon the objection.
The COURT: The objection is overruled.
To which ruling of the Court the defendant then and there duly excepted.

Mr. COWHERD: My objection goes to all this testimony.
The COURT: Yes, sir.

Q. You never attempted to discharge him?
A. No, sir.
Q. He wasn't one of your men?
A. No, sir.
Q. I started to ask you how you divided your money taken in by your conductors when their motorman was running the car, under the rules of operation by the receivers.
A. We retained eighty per cent and gave the Leavenworth line twenty per cent.
Q. That is for the use of their cars?
A. Yes, sir.
Q. Their motormen when they got to the point where your conductor got on—their motormen operated the cars clear around to the point where your conductors got off?
A. Yes, sir.
Q. You didn't own the Kansas City Western cars?
A. No, sir.
Q. When I say "you," either the Metropolitan or the receivers.
A. We had no interest in them whatever.

Cross-examination by Judge MOORE:

Q. Mr. Egan, when were the receivers appointed?
A. June 3rd, 1911.
52 Q. I believe you said there was a written contract existing between the Metropolitan Street Railway Company and the Kansas City Western Railway Company with reference to the operation of the Kansas City Western cars on the tracks of the Metropolitan Street Railway Company in Kansas City, Missouri?
A. There was.
Q. How did it happen that you put on a conductor to take charge of the Kansas City Western cars when it reached your tracks?
A. By an agreement with the Kansas City Western.
Q. Was that agreement in writing?
A. I think it is.
Q. When was it executed?
A. I couldn't say when it was. It was before I became connected with the company.
Q. Before the receivers?
A. Yes, sir, before I became connected with the company.
Q. That was a contract of writing made before the receivership?
A. Yes, sir.
Q. Any way, the operation of the Kansas City Western cars by the Metropolitan in charge of a Metropolitan conductor was pursuant to a written agreement executed before the receivers were appointed?
A. Yes, sir.

Judge MOORE: I move to strike out all his former testimony because it is shown that the car was operated under this written contract.

The COURT: It appears the accident occurred after it went into the hands of the receivers.

53 Judge MOORE: Yes, sir, Mr. Egan says the conductor was operating the Kansas City Western Company car pursuant to a written agreement.

The COURT: The motion to strike out is overruled.

To which ruling of the Court the defendant then and there duly excepted.

Q. You have discharged, or the Metropolitan Street Railway Company has discharged motormen who have been operating the Kansas City Western cars in Kansas City, Missouri—isn't that a fact?

Mr. ATWOOD: Objected to unless it has reference to McAdow.

The Court: Answer the question.

A. We haven't discharged any of them.

Q. Haven't you ordered or requested the Kansas City Western Railway Company to discharge them?

A. We have requested the Kansas City Western Railway Company not to permit certain parties to operate cars upon our tracks.

Q. And you did discharge them or order them discharged?

A. No, we didn't order them discharged.

Q. You requested them to be discharged?

A. We requested them not to permit them to operate cars on our tracks.

Q. That was because your written contract so provided, wasn't it?

A. That is true, sir.

Q. And that was the contract that you referred to a while ago—there was only one written contract, as I understand?

A. Well, I think that there were two or three written contracts—there were contracts and then supplemental contracts.

54 Q. This main contract, the one you referred to, was entered into before the receivers were appointed?

A. Yes, sir.

Q. Do you know where the Kansas City Western tracks stop over in Kansas City, Kansas, at 18th and Grand Avenue?

A. I do, sir.

Q. That is where the cars themselves come onto the Metropolitan Street Railway tracks, is it not?

A. Yes, sir.

Q. The Kansas City Western has no road bed or tracks in Kansas City, Missouri—that is a fact, isn't it?

A. Not that I know of, sir.

Q. Now when it gets to 18th and Central in Kansas City, Kansas, the Metropolitan Street Railway conductor takes charge of the car, is that not the fact?

A. He takes charge of the car.

Q. And remains in charge until it comes over into Missouri, around to Tenth and Main and back through the tunnel back over to Central Avenue again—to 18th and Central, Kansas City, Kansas?

A. That is true.

Q. And the Metropolitan Street Railway conductor has exclusive control over them during that time?

A. Yes, sir.

Q. He collects the fares?

A. He does.

Q. Now, prior to the receivership the Metropolitan Street Railway Company paid the motormen for the service on the Metropolitan tracks?

Mr. ATWOOD: Objected to as incompetent, irrelevant and immaterial, being a time prior to the time of the receivership and the receivers were operating at the time of the accident.

55 The COURT: Answer that question.

A. I don't remember whether they were paid or not. I know that bills were returned monthly, but whether they were held up or not I couldn't say at this time.

Q. The Metropolitan had agreed to pay them, hadn't it?

Mr. ATWOOD: Objected to as calling for the contents of a written instrument.

Judge MOORE: That was our objection a while ago, that the written instrument was the best evidence.

Mr. ATWOOD: We didn't ask anything about the period you are talking about or the terms of it. Of course it is immaterial to ask for the terms of a written contract orally; the contract is the best evidence.

Q. The Metropolitan Street Railway Company was paying the motormen for the services for operating the cars on the tracks of the Metropolitan Street Railway Company?

A. I wouldn't say as to that—I am not so certain about that; I know bills were rendered.

Q. What official knows that?

A. The comptroller or the auditor or the treasurer.

Q. Who is the comptroller?

A. Mr. R. J. Clark is comptroller, and C. F. Cole is auditor.

Q. Are they in the city?

A. They are. If they were paid they would be paid through the treasurer, Mr. J. A. Harder.

Q. That is something you would have no personal knowledge of?

A. I wouldn't see those bills.

Q. There is a cash fare of five cents, I believe, paid to the

56 Metropolitan conductor on the car of the Kansas City Western when it leaves 18th and Central in Kansas City, Kansas, coming over into Kansas City, Missouri—is that correct?

A That is correct.

Q And also a passenger getting on at 10th and Main would pay to the Metropolitan conductor five cents to go to the end of this line at 18th and Central?

A. Yes, sir.

Q. That is where the Kansas City Western tracks begin?

A. Yes, sir.

Q. That is correct?
A. Yes, sir.
Q. Or at any intermediate point?
A. Yes, sir.
Q. How long has that existed, the arrangement of collecting five cents for each passenger when on the Metropolitan tracks?
A. Well, I expected that existed since the time they commenced running. I couldn't say what date that was. It was prior to the time I became connected with the road.
Q. Your understanding is ever since the written contract was entered into?
A. Ever since they commenced running their cars over the road.
Q. They commenced running the cars, did they not, under the written contract?
A. I expect they did.

Mr. ATWOOD: He is trying to lug in the contract. That statement we object to.

The COURT: He can state what was done as a matter of fact—state the facts.

A. Well, since I have been connected with the road we have collected the five cent fare when the cars came on our tracks,
57 and in going from Kansas City, Missouri, over to Kansas City, Kansas, anybody that they would pick up at all, no matter where they were going along, we would collect the five cent fare.
Q. And isn't it a fact, Mr. Egan, that a passenger getting on your car, as you have just described, from the Kansas City Western, is entitled to a transfer when he pays the five cents for the ride, a transfer that will carry him on any other car of the Metropolitan Street Railway Company in Kansas City, Kansas, or Kansas City, Missouri?
A. Yes, sir.
Q. Just the same as on any other car of the Metropolitan Street Railway Company
A. Yes, sir.

Redirect examination by Mr. ATWOOD:

Q. You speak of payments, you don't mean to be understood, Mr. Egan, that any one of the motormen like McAdow, ever came to the Metropolitan office and got a check for his wages?
A. No, sir.
Q. Did any of the Kansas City Western motormen ever come to the Metropolitan office and receive a Metropolitan check, or receivers' check for their wages?
A. On what car?—I don't quite understand you.
Q. The question has been asked you about who paid the motormen?
A. We never paid the motormen.
Q. Whether or not the Kansas City Western tried to get part of their wage scale is another matter. You never hired McAdow or any other of their motormen or paid any of them?

58 Mr. COWHERD: Objected to as being a question of the contract.

The objection was by the Court overruled; to which ruling of the Court the defendant then and there duly excepted.

A. No, sir—we never paid any of the Kansas City Western employees.

Recross-examination by Judge MOORE:

Q. Isn't it a fact, Mr. Egan, that the Kansas City Western Railway Company paid the motormen operating the cars on the Metropolitan tracks, and that the Metropolitan Street Railway Company had agreed to reimburse them?

Mr. ATWOOD: Objected to as calling for the contents of a written instrument, and not the best evidence.

The COURT: The objection is overruled. State what was done.

To which ruling of the Court the defendant then and there duly excepted.

A. There was no money paid the Kansas City Western employees.

Judge MOORE: I move to strike out the answer as not responsive to the question.

Mr. COWHERD: The facts are that these men who ran over the lines in Kansas City, while they were not paid directly by the Metropolitan, the Kansas City Western paid their wages and sent the Metropolitan bills for the amounts paid them during the time they were on the Metropolitan tracks.

59 Mr. ATWOOD: I don't know. I never heard that it had been done, and until this case arose I never supposed such a claim was ever made. You might hire a man and then try to coax John Egan to pay him.

Mr. COWHERD: The ordinances of Kansas City provide that any line reaching Kansas City has a right to cross onto the Metropolitan tracks, and the Metropolitan takes possession and control of those cars, and are responsible for them. There is no dispute as to the facts, if we can get them out.

The COURT: We are trying to get at the facts, I understand.

Mr. COWHERD: I understand that Mr. Egan knows these bills were submitted to the company, but does not know whether they were actually paid or not, because he has nothing to do with the treasury end of it.

Mr. ATWOOD: The legal advisor of the receivers who are now operating the road—Judge Lucas—have directed Mr. Egan not to recognize this contract. At the time of the accident the Metropolitan didn't have anything to do with the control over these tracks, and it couldn't have anything to do with the movements of the trains at that time.

The COURT: The contract has never been offered in evidence yet.

Mr. COWHERD: We will endeavor to locate it to-day.

The COURT: He can show the actual facts as to who operated the cars, regardless of any power.

60 Redirect examination by Mr. ATWOOD:

Q. Are either of the receivers in town—is Mr. Harvey in town, do you know?
A. I understand he is not—I have been told he is not.
Q. Is Mr. Dunham in town?
A. Not that I know of.
Q. Is Mr. Lucas in town?
A. Mr. Lucas is in town.

Recross-examination by Judge MOORE:

Q. Prior to the appointment of the receivers isn't it a fact that the Kansas City Western Railway Company rendered bills to the Metropolitan Street Railway Company for the amounts due the motormen on the cars of the Kansas City Western Railway Company while on the Metropolitan Street Railway tracks in Kansas City, Kansas, and Kansas City, Missouri?

Mr. ATWOOD: Objected to as immaterial.
Mr. COWHERD: We will show the same procedure has been maintained.

A. I think they did, sir.
Q. And they have been running them ever since?
A. That is my understanding of it.
Q. And what you mean to say is simply that since they went into the hands of the receivers they haven't paid the bills?
A. I couldn't say they paid them before.
Q. You mean since they went into the hands of the receivers they haven't paid them?
A. I couldn't say they paid them before.
61 Q. Can you say they paid them since?
A. I know they have not.
Q. You know there are a good many other bills they haven't paid since they went into the hands of the receivers?
A. That is true.

Redirect examination by Mr. ATWOOD:

Q. Are these bills you speak of now treated by the company in the same way as some other bills that you recognize but haven't the funds to pay them, or are you refusing to pay them?

Mr. COWHERD: Objected to as incompetent and irrelevant.
The objection was by the Court overruled; to which ruling of the Court the defendant then and there duly excepted.
Q. State whether you do recognize any written contract between the receivers and the Kansas City Western?

Mr. COWHERD: Objected to as incompetent and irrelevant.

A. Acting under the advice of counsel, we do not.
Q. Counsel of the receivers?
A. Yes, sir.

Judge MOORE: We move to strike out the testimony as incompetent, irrelevant and immaterial.

The motion was by the Court overruled; to which ruling of the Court the defendant then and there duly excepted.

Mr. ATWOOD: Mark this.

The same was marked "1."

62 Mr. ATWOOD: I offer in evidence this exhibit "1," being the answer filed in case No. 67545, Charlotte E. Royal, Executrix, Plaintiff, vs. The Kansas City-Western Railway Company, defendant.

Mr. COWHERD: I think part of the answer is incompetent.

Mr. ATWOOD: I will read, beginning at the middle of the 6th line from the top of page 3 of the answer of the defendant Kansas City-Western Railway Company, in that case.

Said portion of said answer is as follows:

"That at all said times prior to and on the said 18th day of December, A. D. 1911, and at the time of the death of said plaintiff's husband, Grandville V. Royal, he was in defendant's employ and by virtue of being an employee of said defendant at the time of his death was riding on said car No. 9 of said defendant not as a passenger but as such employee, on transportation furnished him because of such employment, while said car was carrying for hire, from the State of Kansas into the State of Missouri, other persons who were then and there interstate passengers, being transported from the state of Kansas into the state of Missouri; that said car was then and there an instrument of defendant in carrying on its business as a common carrier by railroad of interstate commerce.

Said defendant further alleges that if any cause of action exists against it in favor of said plaintiff, on account of the death of said Grandville V. Royal, which defendant denies, such cause of

63 action accrued to plaintiff solely under and by virtue of the act of Congress of the United States entitled: "An Act Relating to the Liability of Common Carriers by Railroad to their Employees in certain cases," approved April 22, 1908, and the amendment thereto approved April 5th, 1910; that said plaintiff has no right to and cannot maintain this action under any statute of the State of Kansas.

Sixth. The said defendant further alleges that the death of said Grandville V. Royal was caused solely or primarily by his own negligence co-operating with the negligence of one —— Lowe, a fellow-servant of said Grandville V. Royal, as hereinafter alleged."

Judge MOORE: That part of the answer in which it alleges that it was the negligence of Royal which caused the accident, is objected to by the defendant as incompetent, irrelevant and immaterial.

The objection was by the Court overruled. To which ruling of the Court the defendant then and there duly excepted.

Mr. ATWOOD: That is the part that has a bearing upon the case.

The further hearing of this cause was here adjourned until February 4th, 1913.

On February 4th, 1913, pursuant to adjournment, the further hearing of this cause was proceeded with as follows:

GEORGE B. MCADOW, having been duly sworn as a witness in his own behalf, testified as follows:

64 Direct examination by Mr. ATWOOD:

Q. What is your name, Mr. McAdow?
A. George B. McAdow.
Q. You are the plaintiff in this case, Mac?
A. Yes, sir.
Q. Where do you live?
A. 1405 Virginia Avenue, Kansas City, Kansas.
Q. With whom do you live?
A. My wife and daughter.
Q. How old are you?
A. Fifty-four.
Q. How old were you on the 18th of December, 1911?
A. About 53.
Q. Where were you born?
A. In Platte County, Missouri.
Q. What has been your business or occupation during your life?
A. I have been a laborer all my life—working—just common labor.
Q. When did you first become an employee, if you ever did, of the Kansas City-Western Railway?
A. About the middle of February, 1906.
Q. And you continued in their employ down to the time of this injury?
A. Yes, sir.
Q. What was your first run or duties?
A. Extra list.
Q. What does that mean?
A. Well, you are an extra man, in case a regular man wants to lay off temporarily you take his run, no matter what run—if a daylight trip or twelve hours then you fill his place for that run.
Q. What different sorts of runs have you there?
65 A. I have had extras, specials, what they call trippers—12 hours, and daylights.
Q. What sort of cars did you run, passenger cars or freight cars?
A. Passenger cars and freight cars.
Q. In other words, I take it you had run all kinds of cars that run on that railway, and all sorts of trips?
A. I never run a work car—I run all but the work cars.
Q. Were you ever employed in any capacity by the defendant company in Kansas City, except as motorman?
A. No, sir, only motorman.
Q. Where do the cars run to—say the cars should start from one — of the line, where is the other end?—where do they go?
A. From Fort Leavenworth, to 10th and Main, Kansas City, Missouri—that is our destination.

Q. Is that a double or single track road?

A. Single track.

Q. Outside of the cities, I mean?

A. From Richards, north, it is a double track, in the neighborhood of a mile, to the Soldiers' Home—between Lansing and the Soldiers' Home.

Q. Beginning at Fort Leavenworth what stations do you pass coming south from Fort Leavenworth?

A. We have got to make the stops at the streets in Leavenworth, to 3rd and Delaware—that is where the office is.

Q. The office of the defendant company?

A. Yes, sir.

Q. That is on the corner of 3rd and Delaware?

A. 2nd door from the corner of 3rd and Delaware, where we get our train orders, from the dispatcher; and of course
66 we made the city stops, and then the Soldiers' Home, Richards, Lansing, Hyatt, Edison, Pope—I forget the name of a little stop just south of Pope there.

Q. Where is the bluff switch?

A. That is north of Walcott.

Q. It isn't necessary to name them all.

A. And then Bluff Switch, and then Walcott——

Q. And south from Walcott to Kansas City?

A. Nova Vista, Marshall Creek, Baker, Bethel, Vain, Northwestern Crossing, Fairdale, Brennan Heights, Welborn, Quindaro, and then begin the city stops to Chelsea Junction.

Q. Are those all passing points?

A. No, I could give you the passing points—that is, where the switches are.

Q. That is what I mean—where a north-bound car could pass a south-bound car.

A. Down to Richards is a double track and then at Lansing, then at Hyatt, then at Pope, and then Bluff Switch, Walcott, Marshall Creek, Bethel, Vain, Baker and Chelsea Junction. Those are passing points—switches.

Q. Is there any passing point between Bethel and Walcott?

A. Marshall Creek.

Q. You having worked on this railway all these years, I assume you know the usage and customs governing the movements of the cars—is that a fact?

A. Yes, sir.

Q. Who are the cars moved by—whose orders?

A. By the train dispatcher stationed at Walcott.

Q. How does he communicate—by what means?

A. Telephone.

67 Q. And communicates to who?

A. Conductor plugs in—he plugs in and the conductor calls for orders and states where he is at and which way bound, and the dispatcher gives him orders; the conductor repeats the order as the dispatcher gives it to him, and the motorman takes the phone

and repeats it as the conductor did, and the dispatcher o-k's it—says "all right."

Q. There was one dispatcher at Walcott?

A. One dispatcher at a time.

Q. When you plug in at points, as you call it, the points where the motorman and conductor can telephone are at how many places?

A. They used to have them about every 12 poles, and now they have got them about every 24 poles—something like that—About every 24 or 25 poles apart, a jack box where we can plug when we call up a dispatcher.

Q. You say you have run freight cars?

A. I have—a few times—not regular.

Q. Do you know the way in which packages of freight or express were marked upon these freight cars that you drove?

Mr. COWHERD: Objected to as not relevant or material to any issue in the case, and are not competent for proving any issue in the case. The purpose, I suppose, is to try to show that we carried freight from Kansas City, Missouri, to points in Kansas. The fact a package is marked a certain way doesn't show it was carried on the road in that way, and as a matter of fact it was not.

The objection was by the Court overruled. To which
68 ruling of the Court the defendant then and there duly expected.

Q. How were the packages marked that you handled while working as a motorman on the defendant road?

A. Some of these shippers over here who shipped to Leavenworth. I can't think of all their names.

Q. Give any you recollect?

A. Well, I think Ginnocio & Jones—they are fruit dealers—and Evans & Co. also—it is a drug house.

Q. Over in Kansas City, Missouri?

A. Yes, sir.

Q. And they were delivered where?

A. Along the road clear to Leavenworth.

Q. Did you handle the packages or not?

A. Yes—the motorman and conductor both handles them—that is, in loading them and unloading.

Mr. COWHERD: I take it it is understood that our objection goes to all this testimony?

The COURT: Yes, sir.

Q. And it is from the loading and unloading that you have knowledge of these marks?

A. Yes, sir.

Q. Now then with relation to the movement of passengers from Leavenworth to Kansas City, Missouri. What change, if any, was there made in the cars, or was the same car used, or how was it?

A. The same car ran through from one end of the road to the other. Passengers would get on here and go to the different points, clear to Leavenworth or Fort Leavenworth.

Q. When you were put to work by that company, who hired you?

A. J. W. Richardson, general superintendent.

69 Q. Were you ever hired to work for the Kansas City-Western by anybody except Mr. Richardson?

A. J. W. Richardson was the only person.

Q. Were you ever paid by anybody except the Kansas City-Western, the defendant company in this case, after you went to work being hired by Richardson as you stated?

A. No, sir, I was not—the checks were all the Kansas City-Western.

Q. Did you ever have knowledge or information that anybody claimed you were working for the Metropolitan?

Mr. COWHERD: I don't think any information he may have had would be competent testimony.

Q. I think perhaps that is improper.

Q. Do you have knowledge of a claim by anybody in any way being made that you were working for anybody but the Kansas City-Western, from the time you were hired by Mr. Richardson?

A. No, sir, I didn't know anything about it.

Q. How long had you been on this run that you were on on the day of the collision, about?

A. I took that run some time in the spring—I don't remember just what month. I guess it must have been about the latter part of March or first of April of 1911.

Q. What were the hours that constituted your run, after your employment?

A. From 5:30 A. M. to 5:30 P. M.—straight time through—twelve hours.

Q. And part of the 12 hours was employed in going from Kansas over into Missouri, around to 10th and Main, and back into Kansas?

70 A. We started at 5:30 A. M. and went to Kansas City, Missouri, at 10th and Main, and around on out 9th Street to Wyandotte, to 8th, the same way we came on to Kansas City and Fort Leavenworth.

Q. I have already asked you if this was a single track road?

A. Yes, sir.

Q. I forgot to ask you how your health had always been prior to this collision?

A. Why my health was good.

Q. How steady did you work during those six years?

A. Well, sir, I lost but very little time—the most time I ever lost was in November before I was hurt. I took a ten day lay-off and went to visit my son at Wakenda, Missouri—in Carroll County.

Q. Your son is married and lives there?

A. Yes, sir.

Q. What other time did you lose?

A. I have taken maybe two or three days once in a while. A fellow gets tired of working steady every day, and the extra men would have to have work.

Q. At any time were you off on account of your wife's sickness?
A. Yes. I think there were two or three months there I didn't work more than half time, on account of her being sick. She was operated on on the 25th day of June.

Mr. COWHERD: We object to all this family history.
Mr. ATWOOD: I simply wanted to show why he was not at his business.
Mr. COWHERD: We object to it as incompetent and immaterial and prejudicial.

71 The objection was by the Court sustained.

Q. Were you furnished time-tables?
A. Yes, sir.
Q. Did you have that card or pamphlet in which the time-table was, in your possession?
A. Yes, sir,—every motorman and conductor had to carry his time-card with him all the time on duty. That was strict orders.
Q. State whether on that time card there was 10th and Main, in Kansas City, Missouri, as a point named?
A. Yes, sir, in plain print at the bottom of the page—10th and Main, Kansas City, Mo.—even hours; say 1 o'clock and 2 o'clock.
Q. That is the car passed every hour on that point on the even hour?
A. Yes, sir, they were due there according to the time card.
Q. Beginning what time in the morning?
A. Six o'clock—to eleven at night.
Q. Six o'clock, eight o'clock, and so on—to eleven o'clock?
A. Yes, sir, every hour.
Q. On the day of this collision, Mac, what time did you go to work?
A. 5:30 A. M.
Q. Where was the point at which you got your car?
A. Chelsea Junction.
Q. Was that a point where cars were stored or kept?
A. Yes—some few there—maybe two or three.
Q. What sort of a car were you driving that day?
A. I had one of this type of cars they had, about 55 feet long, cane seats, and multiple unit controller—75 horse-power motor.
Q. What were they geared at?
72 A. Forty-five—that is what the instructions were—that includes straight level track—forty-five miles.

Mr. ATWOOD: Mark this.
The same was marked "2."

Q. I understand exhibit "2" that has been furnished us by counsel for the defense, is a type-written copy of the rules. Were you ever furnished with any like that, Mac?
A. Mr. Richardson would put up orders, you know, to govern the train crews, and would have a bulletin board and take them on and we were supposed to read them.

Q. Do you know whether or not this expresses the usages that controlled the situation—"Motormen, conductors and all employees who run and operate Interurban cars, are required to carry a copy of the time car-s and keep them in their possession at all times, and both motormen and conductors must consult the time card before starting on a trip over the road, to know positively where they are to meet all other cars during the trip. Motormen and conductors will read the instructions on the back of the conductor's and motorman's train orders, and carry them out to the letter under all circumstances."

A. Yes, sir—strict orders.

Q. What were the directions, if any, given you when you were employed or at any other time prior to the day of the collision, about the speed at which you were to run the car?

A. Well, Mr. Richardson, when I started to break in, put me on a daylight run, with a day-light motorman, to learn the road; and the instructions—I am supposed to read all these orders and also
73 obey all these orders, and he told me not to move the car over the road under any circumstances without orders from the dispatcher at Wolcott, and to obey all orders.

Q. What about the speed at which the car was to be driven?

A. Of course, if we had a good deal of work to do, of course we had to go on good tracks as fast as we can, to govern ourselves by the track and the business—if we didn't have much work to do and it wasn't hard to make time—we had to run to make the schedule come out correct at all points.

Q. If between Bethel and Leavenworth you had to make twenty stops, you had to run faster than if only two stops?

A. Yes, sir, according to the stops and the work you had to do, and the road—that is the way you ran.

Q. You were to run fast or slow according to the time you had to make up?

A. You are supposed to make up the full time run, as far as you could—of course running safe in dangerous points.

Q. You were given those instructions?

A. Those were my instructions.

Q. Given to you by Mr. Richardson?

A. Yes, sir.

Q. Now, on the day of the collision you took your run, I understood, at 5:30 in the morning?

A. Yes, sir.

Q. At what point?

A. I took the car at Chelsea Junction and went to 10th and Main.

Q. What did you do when first you went to your car with relation to communicating with Wolcott?

74 A. Why we called up for our orders—called the train dispatcher there in the office at Wolcott.

Q. Who was your conductor?

A. James Marquis.

Q. You called up who?

A. Called the despatcher.

Q. What was the order you got?

A. Go to Missouri—that meant 10th and Main, Kansas City, Mo.

Mr. COWHERD: That is objected to, and I move it be stricken out as a conclusion of the witness as to what it meant when it said "go to Missouri."

The COURT: Just state what it was.

Q. What are the usages and customs with relation to your instructions—what do the different terms mean that were employed, if you know, on the road, with relation to the points?

Mr. COWHERD: The first question would be to show what terms are used and then the Court could pass on the question as to whether the witness has a right to explain—but not start out to construe things that we don't know but what they will construe themselves. That is not proper.

Mr. ATWOOD: The question is withdrawn.

Q. Under the usages and customs and your experience on the road, would the terms used mean some point in Missouri you were obliged to make?

Mr. COWHERD: Objected to as incompetent, irrelevant and immaterial and assuming a fact to be proven.

The COURT: He may answer.

To which ruling of the Court the defendant then and there duly excepted.

75 A. You mean the stops?

Q. In Missouri—you have already described that.

A. We started from Chelsea Junction at 5:30 A. M. and came on through.

Q. What name was given to the stop you have spoken of at 10th and Main?

A. 10th & Main, Kansas City, Missouri.

Q. Was it sometimes spoken of as "Missouri"?

Mr. COWHERD: Objected to as leading, and it is incompetent for him to construe it.

The COURT: He can state what was said and what he understood that it meant.

To which ruling of the Court the defendant then and there duly excepted.

Q. When the words "go to Missouri" were said, what, under the usages and customs as you knew them, did that mean to a man who understood it?

A. 10th and Main.

Mr. COWHERD: Objected to as incompetent, irrelevant and immaterial and assuming some custom not proven to exist and calling for a conclusion of the witness.

The objection was by the Court overruled. To which ruling of the Court the defendant then and there duly excepted.

Q. Who plunged in there first that morning?

A. We have a telephone—you just take the receiver down and the conductor gets the orders first.

Q. You stand right by him?

A. Yes, sir, and hear him repeat the order as the de-
76 spatcher gives it to him, and then the motorman has to repeat what the conductor says and sometimes the despatcher repeats it over the same or says "yes."

Q. Now when Marquis—of course, you couldn't hear what was said then, at the other end of the line, that Marquis was talking to—but what did you hear Marquis say that morning?

A. "Go to Missouri."

Judge MOORE: Objected to as incompetent, irrelevant and immaterial.

Mr. ATWOOD: We will withdraw it—if they object to it and don't want the jury to know what was said we will withdraw the question.

Judge MOORE: We object to that remark.

Q. Did you take the phone after Marquis?

A. Yes, sir.

Q. What did you hear from the other end of the line?

A. "Go to Missouri."

Q. Who was talking at the other end of the line—do you know his name?

A. Grandville P. Royal, the night dispatcher.

Q. What was his position with the company at that time?

A. He was the train dispatcher.

Q. How many train dispatchers were there at that time?

A. Three.

Q. And he was one of them?

A. Yes, sir.

Q. How long had you worked under him—how long had he been train dispatcher?

A. I don't know. In the neighborhood of two years, I think, or something like that—I couldn't say—more or less.

Q. You repeated the order?

A. I repeated the order.

77 Q. And got onto your car?

A. Yes, sir, and backed out.

Q. And where did you go after you got on your car and started?

A. I backed out to the main line and came to 10th and Main, Kansas City, Missouri.

Q. What sort of a morning was it?

A. It was a real foggy morning—a damp, cold, foggy morning.

Q. Did that result in your running more slowly than otherwise you would have been running?

A. It certainly did.

Q. When you got to 10th and Main were there any people to get on?

A. Yes, sir.

Q. Do you remember any of them?

A. I remember a fellow named Mike Burnes, who was working in Leavenworth.

Q. Did you know him?

A. I did. I had hauled him so much I had got acquainted with him. He used to go Monday morning on my car to work, and come back Saturday evening at 4:30 and get off at 10th and Main.

Q. Were there people getting on at 10th and Main besides Mike?

A. Yes, sir, some I didn't know. And some I don't know yet. And a fellow got on at 9th and Main—Mr. Burnes knew him. His name was Hill—I heard him call his name.

Q. Where did you go after starting from 10th and Main on your return trip?

A. I had to run carefully through Kansas City, Missouri, you know, because you couldn't see any distance ahead of you—only a very few feet—to prevent collisions, until I got to 18th and
78 Central. There we plugged in and my conductor called for orders. He said meet one car at Grandview and report at Bethel—I took the receiver and repeated the same—one car at Grandview and report at Bethel—I repeated it to him as he had to the conductor.

Q. Where did you go when you received this order from Mr. Royal, the train dispatcher—you were then at Chelsea Junction?

A. Yes, sir—Kansas City, Kansas.

Q. You ran from Chelsea Junction where?

A. We backed out to the main line and switched over and came over here, 10th and Main, Kansas City, Missouri, and then we came back to Central Avenue—18th and Central—we went from 18th and Central up through the tunnel to 8th and Wyandotte, south to 10th and Wyandotte, and down to 10th and Main, and then north to the Junction, and west on 9th Street to Wyandotte, north on Wyandotte to 8th, and then on west back to 18th and Central.

Q. The order of Grandville Royal, the train dispatcher, was given at Chelsea Junction to you to come on over in Missouri and back to 18th and Central?

A. Yes, sir.

Mr. COWHERD: Objected to as calling for a conclusion of the witness and as leading and suggestive.

Q. All right—I will put it this way—after receiving that order from Grandville Royal, the train dispatcher of the defendant company, there at Chelsea Junction, to go to Missouri, did you receive any other order from anybody with relation to where you
79 should go, until you had gone from Chelsea Junction over in Missouri to 10th and Main, and back from Missouri into Kansas at 18th and Central?

A. We did not.

Q. When you got back to 18th and Central were you on your time?

A. Twelve minutes late.

Q. That was due to the fog?

A. Due to fog—we were running slow and careful.

Q. When you plugged in there who answered the phone?
A. Grandville Royal.
Q. The train dispatcher?
A. The same dispatcher that gave us our orders at Chelsea Junction.
Q. What were your instructions?
A. Meet one car at Grandview and report at Bethel.
Q. What did you do then?
A. I took the receiver and repeated the same—"Meet one car at Grandview and report at Bethel"—and he said, "Yes, meet one car at Grandview and report at Bethel."
Q. Did you go to Grandview?
A. Yes, sir, we pulled on the sidetrack.
Q. Did you have to wait for a car?
A. That was already come up.
Q. You passed a car there at Grandview?
A. Yes, sir.
Q. You then proceeded north?
A. Yes, sir.
Q. Where was the next place you plugged in?
A. At Bethel.
Q. How far south is Bethel from Wolcott?
A. It is in the neighborhood of four miles, I guess—something like that—the schedule was ten minutes.
Q. Did you have any telephonic communications with the
80 train dispatcher there?
A. Yes, sir, we plugged in and I gave the conductor the receiver.
Q. Explain what this plugging in is?
A. Well, the motorman—every car has a little plug—you take the receiver down and put it this way, and plug this in, and it has got a kind of ring there—you make this go in and that makes a connection over the phone.
Q. There is a phone wire that comes down?
A. Yes, it comes down in the jack box and when you plug that the conductor at Bethel when he calls for orders, said "Marquis is at Bethel"——
Q. (Interrupting.) When he called up he said "Marquis at Bethel"?
A. Yes, sir.
Mr. COWHERD: You are stating what he said that particular morning?
A. Yes, sir. He said "No, I haven't." The dispatcher when we would have a loss of time would say "Have you any work to do?"—that means, any stops between this point where they want us to run to. Then he says "Run to Wolcott"—so I take the receiver and I says "Run to Wolcott?" He says "yes come on to Wolcott as quick as you can."
Q. Of course he knew you were then at Bethel?
A. Yes, sir, I was twelve minutes late. I hadn't got to make up any time—I was twelve minutes late.

Q. There is in the train dispatcher's office a card or pamphlet that showed when you ought to be at Bethel?

A. Yes, sir, the dispatchers had a time card.

Q. So if you were 12 minutes late at Bethel and you called up, he knew you were 12 minutes late?

A. Yes, sir.

81 Q. He said hurry up?

A. He said come to Wolcott and come as quick as you can.

Q. Did you start then?

A. We did.

Q. How fast were you running—of course you didn't get to running fast right away?

A. Why, we went pretty fast—down the hill—as fast as you can, by the red barn, and turn on further and you go up a hill, and when we get over the hill and begin down the hill, down to Marshall Creek, and our orders were to slow up and watch for lights—of course if you see a light burning you can stop—they might have it turned on for somebody else—it didn't make any difference—when you see these lights burning you mustn't go past them.

Q. After receiving such an order as you did at Bethel you had a right to assume you had a clear track unless you saw these lights?

A. Yes, sir.

Q. And then it is your business to get into communication and get new orders?

A. Yes, sir.

Q. The light meant to stop?

A. Yes, sir, that is correct.

Q. Were there any lights of that character burning before this collision?

A. No, sir, there were not.

Q. How fast were you going, do you think, at the time of the collision?

A. Well, I was going as hard as I could.

Q. Complying with the orders?

A. Yes, sir.

Mr. COWHERD: I object to his leading the witness all the time.

Q. State whether or not when you were going down there the way you have last described, it was in compliance with the orders or not?

82 Mr. COWHERD: The witness has already stated the order—it is for the jury to say whether he complied or not.

The COURT: Answer the question.

To which ruling of the court the defendant then and there duly excepted.

A. I was running in compliance with the order—I was running according to orders.

Q. Can you state about what rate of speed it was—whether 40 or 45 or 50 miles—we don't expect it exactly?

A. Well, 45 or 50 miles an hour.

Q. How long is the car?

A. About 55 feet long—that is, from tip to tip.

Q. How was that divided up, if it is divided?

A. Two apartments—what is called the coach proper where the ladies ride, and gentlemen too, of course, and the smoking compartment, up in front, probably a third or a fourth of the way back of the car is a partition where the gentlemen go in to smoke. There is a solid wall between the motorman's vestibule and the smoking compartment, and there were three windows, and those windows dropped and I had the windows down. There was a big stove heater, and my stool and my tool box was there, and the vestibule is two and a half feet in width—the place where the motorman sits.

Q. How wide are those cars, Mac?

A. I don't know. I couldn't say how wide they were, Mr. Atwood. I never measured them, only the length. I have measured that when we would be laying over there at Fort Leavenworth.

83 Q. When you speak of the compartment being so wide, you mean lengthways of the car it was two and a half feet?

A. Two and a half feet from this partition between the motorman and the smoking part—I say it is two and a half feet where the motorman sits; and from that is a big stove—a hot water heater—and he has his tools and tool box he has to carry with him all the time in case he needs them. That is to his left. And to his right is the door, and the door opens into a vestibule—it don't open out, it opens in, but the motorman opens the door—he turns the door to him.

Q. Does the door open out outdoors or into the smoking car?

A. It opens on the side of the vestibule—out from the car. When I want to go in, out from the vestibule into the coach, the only way you can get out of the vestibule into the coach is to come through the window.

Q. There is a solid wall there?

A. Yes, sir, a solid wall across there.

Q. How high up?

A. Oh, probably that high (showing).

Q. Waist-high on a man?

A. Something like that.

Q. And above that point are windows?

A. Yes, sir. They drop down.

Q. On this morning your windows were open?

A. Yes—they were down.

Q. How long is that smoking compartment, about?

A. Oh, I think it is about 16 feet—maybe a little more or maybe a little less.

84 Q. And that has seats?

A. Yes, sir.

Q. On either side of the car?

A. On both sides of the car.

Q. And are the seats on either side of the car in the ladies' part of the car?

A. Yes, sir.

Q. And long cane seats at the rear part of the coach?

A. Yes, sir.

Q. When you pulled out of Bethel and came along at the rate you described, how was the fog then?

A. Well, the fog was pretty bad. And where there were crossings I always blowed my whistle, in case of accidents.

Q. And was there any crossing at the point where the collision took place or near it?

A. No, sir.

Q. That was supposed to be a clear track?

A. That was inside of the company's fence—no crossing whatever.

Q. Now what did you first see, just before the collision?

A. Well, I was going around a curve—my headlight was burning. I could see a very little ways—I couldn't see over 30 or 40 feet, I don't think, at all. And I was watching particularly in case of farmers—lots of them walk along the track—probably going somewhere—and as my overhead light came around the curve it hit the corner of the car. I thought to myself "what in the world is that"—and in an instant it hit the glass.

Q. Your light hit his light?

A. It hit the other motorman's front end.

Q. The rays of the lamp on your car hit the glass front of
85 the other car?

A. Yes, sir, it hit the glass—I couldn't say what it was—I threw my air lever over—threw on the air.

Q. You mean by that the air brake?

A. Yes, sir. And that is all I had time to do—and then I wheeled, and then the accident was.

Q. What was your position, Mac, with relation to the windows behind you—the windows of the partition separating your little coop from the smoking part of the car? What was your relation to those windows at the time you were struck—what were you trying to do?

A. I was sitting on my stool; when I seen the car I threw the air on full head and as I wheeled to make a jump I said for God's sake men, jump, and then the crash came and I don't remember any more.

Q. Of course, you don't know how long you were unconscious?

A. No.

Q. When you came to what is the first thing you heard or saw?

A. A little boy screaming.

Q. Where were you when you became conscious?

A. I was sitting in the corner, on the first seat in the smoker—that is, at the partition between the two coaches, the two compartments—clear back to the first seat as you came out of the coach proper into the smoking compartment.

Q. From the time of the crash until you came to, you had got some way from your place in your little compartment the whole length of the smoking compartment and were on the seat near the door into the ladies' compartment?

A. Yes, but I don't know how I got there.

86 Q. Was there anybody besides you, at the time you came to—close to you?

A. I remember some passenger said, "Mac, here is your cap," and they tried to straighten it the best they could and put it on my head.

Q. What did you do after you came to? Of course you didn't for a minute or two do anything, but when did you do anything? When did you do anything at all? What was the first thing you did?

A. Well, I got up and I walked back—the other men had left the door open——

Q. Into the ladies' part?

A. Yes, between the two compartments.

Q. From the smoking compartment to the ladies' compartment?

A. Yes, sir, and I got out of my car and I walked around and I seen the wreck, and the first person I seen they had got out Mr. Lowe, the other motorman—he was laying there—I don't remember where. And he was dead.

Q. It was Lowe, the motorman of the other car?

A. Yes, sir, the motorman of the car I ran into.

Q. Was that A. W. Lowe?

A. We called him "Bert"—I don't know his initials.

Q. Do you know of any other Lowe than this Lowe who was motorman at the time?

A. He was the only employe at that time.

Q. His name was Albert W.?

A. Yes, sir, Albert—we called him "Bert."

Q. What else did you see?

Mr. COWHERD: This is after the collision had occurred. It is simply a description of the injuries of other people, and
87 we don't think it is competent in this case, and we want to object to it.

Mr. ATWOOD: I don't insist on it. I will withdraw the question.

Q. What about the condition of the two cars?

A. I seen my car was run over into his car—his car was all mashed up—it looked to me, as near as I can remember, about half way through. Of course I couldn't state just how far, but I seen it was a terrible mash-up.

Q. What did you do next, after you saw what you did see? After you got out of the car where did you attempt to go?

A. Then I went back—I began to hurt more—I wasn't feeling hurt when I got out of the car—I didn't realize I was hurt. Then I began to hurt and I thought I would get back and sit down. I got to the front end of the coach and went to get on the steps and then I began to suffer and draw here—I said to some men coming on to catch me before I fell, and then they helped me in the car and tried to lay me down in this long seat in the rear of the coach, but I couldn't lay down—I kept coming over—I twisted over three or four inches (showing)—as far over as I could get.

Q. Where did they go, or what did they do with you after you got back in the car and you sat on the long seat?

A. They took us to Wolcott, I think. They carried me from the

car in which I was seated, and then they got us on there and took us to Wolcott, on the "Red Betsy" the work car.

Q. Who was put on the Red Betsy besides you?

A. Mr. Slagle's little boy, and Mr. and Mrs. Murphy, and
88 Clyde Taylor, and Granville Royal and Bert Lowe. I don't know whether the passengers on the train went or not—I don't remember—but they took us to Wolcott.

Q. Did you see any doctors at that point?

A. It must have been half past nine or ten o'clock—I don't know just what time, we got there; I know it seemed long to me.

Q. Who were they?

A. I didn't know them at the time, but afterwards they got me to Leavenworth and they told me it was Dr. Vaughan and Dr. Combs and another doctor I don't remember his name.

Q. Did they do anything for you before you got to Leavenworth?

A. They came to me and commenced unbuttoning my clothes—and I said "Doctors, let me go for a while and go to them that need you worse than I do and I will try to stand it as best I can until you get through with them, and then come to me and fix me." I said, "I will do the best I can"—they said, "all right"—and then they went to work. I don't know what they did. I didn't see them. But they went to the other persons injured.

Q. Did they do anything of a medical nature—any plasters or anything, until you got to Leavenworth?

A. They never done anything until we got to the Cushing Hospital at Leavenworth, except to give me a little something to quench my thirst. They waited on me at the Cushing Hospital.

Q. Were you put to bed there?

A. They put me to bed there, got my clothes off—changed my clothes and put a gown on me and Dr. Vaughan pressed me
89 on the back—kind of examined me, and got down here and I hollered; and on my shoulder blade and also down the small of my back. He said, "you have got two broken ribs"——

Mr. ATWOOD: Don't matter about what they said. We will strike that out.

Mr. COWHERD: I haven't objected to what the doctor said.

Mr. ATWOOD: Let it appear there is no objection to any statement of what the doctor said, remaining in the record.

Q. Where were these broken ribs that he told you about—point on me.

A. Right about in there (pointing).

Q. (Indicating the middle of the back.) What other marks were there on you?

A. I had a cut up here probably an inch long, and then he said that my nose was skinned—that is the only place the flesh was broken.

Q. You indicate the left side of the head—the left side of the nose. What about the plasters on you at the hospital?

A. Yes, they put plasters around here (pointing).

Q. How long did you remain at the hospital?

A. I went there on the 18th of December and left January 2nd, 1912.

Q. Then where did they take you?

A. They sent a hack over to the Cushing Hospital and my wife and Mr. Sam Hearn, they took me up to 3rd and Delaware, to the office, and when the car came they helped me out into the car
90 and it brought me to 10th and Central, and there also by a hack they took me home, from 10th and Central, Kansas City, Kansas.

Q. How were you able to lie in bed when you were in the hospital?

A. I had to stay over here—forward (showing)—I couldn't lean back at all; and they had to prop pillows behind me—I couldn't bear any pressure on my back. And this is the way I lay or sat in the bed. I didn't lie down for three or four days, and then I began to ease back a little.

Q. When you got over the shock so you began to feel the pain that you did feel—you spoke of this injury in the back, what about the shoulder blades?

A. It felt to me like it was all crushed, it hurt so—that left shoulder blade.

Q. How about the pain continuing or not continuing from that time on?

A. I never was out of pain, day or night.

Q. When you got home were you put to bed? Or sitting up, or how did you do?

A. I sat up a little while. My sister and my wife were there, and they got something, and when I went to bed I took a chill—I was so cold and shaking so—they got hot water and things to put all around me, to warm me, and Sam Hearn had come along, so he helped my wife and sister do something.

Q. Did any other doctor come to see you—any company doctor, I mean?

A. Dr. Stemen.

Q. Is he a company doctor?

A. Yes, sir.

Q. And was Combs—and Vaughan?

A. I don't know whether Combs was, but Dr. Vaughan was.

91 Q. Did Stemen doctor you some?

A. No, sir, all he ever did for me was to pull the plasters off.

Q. Did you send for him?

A. Dr. Combs told me to come back to Leavenworth Friday. I wasn't able to go, and so my wife went up to 4th and Minnesota, to the office, and told the circumstances, so they called to Leavenworth and they told them to send Dr. Stemen out, and so he came out. He came out and looked at me, and I was suffering awful bad—I said, Doctor, in the name of sense, can't you give me something to relieve me? He said, Mac, I would be more than glad to—I could give you morphine, but I would make a fiend out of you.

Q. What other doctors did you ever have come to you?

A. Well, on the 17th of January I called Dr. Joy in.

Q. Dr. Joy, of Kansas City, Kansas?
A. Yes, sir.
Mr. COWHERD: Who called in Joy?
A. My wife did. He examined me and gave me medicine and tried to help me. He gave me liquid medicine and gave me tablets—white tablets.
Q. Did you have any other doctor?
A. Yes, sir, I think his initials were W. W. Smith.
Q. And you were examined by Dr. Robinson here?
A. Yes, sir.
Q. You say you have been in pain continuously. I will ask you how about your ability to move your arms now—how much can you move them?
A. I can't move them very much.
92 Q. Stand up and show to the jury just how much you can move them, in a forward and back direction.
A. (Witness stands up and shows to jury.) That is as far as I can get my left arm out—I can't get it up to the top of my head that way.
Q. Can't you get it up quick, this way (showing)?
A. No, sir, I can't stand the misery. There is pain down over the back to the hips.
Q. Can't you get that up quick?
A. No, sir, that is as high as it will go—it hurts me—I can't get it straightened out—I can get it out that far—I can't get it out as it ought to be—you have got to come gradually and this way (showing).
Q. That is as far back as you can get it?
A. Yes, sir—either one of them.
Q. Is your sexual power present or gone?
A. I have no feeling for it.
Q. Were you reasonably vigorous before?
A. Yes—certainly.
Q. What about your walking, and what difficulty, if any, do you have, and how and where?
A. I have to walk with a cane. I can't go without a cane. And it hurts my back, over this side (showing)—more than it does on my right. My left side is the worst, and on my back, and from there on up in my shoulders, and in there—and my side, and often my breast hurts me—I don't know whether it is from the misery in my back or not.
Q. Were you all right before this happened?
A. I was—yes, sir.
93 Q. How about when you jolt over crossings on a street car?
A. It hurts me to ride often on the street cars—lots of times I have got to raise up to try to get relief—it hurts me to try to ride on the street car.
Q. Are you able to undress?
A. No, sir.
Q. Who does that?

A. My wife and daughter have done that—I can't put my pants and shoes on.

Q. When you have to go to the toilet?

A. My wife has to attend to it.

Q. How about the fleshy part of your shoulder—is it as large as it was before you were hurt?

A. It don't seem to me like as big—somewhat drawed some way about here (indicating).

Mr. COWHERD: That is objected to. Unless the witness knows something in regard to it, he shouldn't testify to it.

Q. What is the fact as to whether or not it is as full, or less full, or more full?

A. Well, it ain't as full.

Mr. COWHERD: Which shoulder is it?

Mr. ATWOOD: Both.

Q. What about the strength of the hands and arms?

A. My strength isn't much, I can't stand the weight of pressure, or lift anything or anything of that kind.

Q. What work have you been able to do since?

A. Nothing at all. Of course I help my wife wipe dishes.

Q. How do you get into bed?

A. Well, I have to get over—I can't sit on the bed—when
94 the covers are turned down I ease along on my pillows. I sleep on three big pillows all the time. I have to sleep that way to keep the pressure off my shoulder blade and back.

Q. Is the pain more or less now than shortly after the accident?

A. I have just about as hard darting pains now as then.

Q. How about your sleep, now and then? Did you sleep well before, and how about now?

A. I slept good before, and last night I had to get up and sit up and walk the floor and try to get eased—my sleep is very uneasy.

Q. What about the operations of the bladder?

A. I have to get up four or five times at night—as much as six times.

Q. Is it scanty and frequent?

A. Yes, sir.

Q. Were you all right about that, before?

A. Yes, sir.

Cross-examination by Mr. COWHERD:

Q. When did you weigh last, Mr. McAdow?

A. It has been two months or more.

Q. What did you weigh?

A. It was 153½.

Q. What did you weigh before the injury?

A. I weighed 165 pounds.

Q. When?

A. In 1911. I weighed the Saturday before I was hurt.

Q. At what place?

A. I weighed at Wright's—W. H. Wright's.

Q. That was the Saturday before you were hurt?

A. Yes, sir.

95 Q. You were feeling fine then?

A. I was feeling fine—yes—and there was nothing the matter with me.

Q. That was about the healthy weight you had been weighing?

A. 165, yes.

Q. Was that about the weight you had weighed for years before?

A. As a general thing, in the winter time and cool weather, I weighed 165.

Q. And now since this injury you weighed 153½?

A. Yes, sir.

Q. Only 12 pounds difference. Now, Mr. McAdow, when you were running these cars—this freight train—where did you take the train?

A. The freight—Chelsea Junction, in the morning.

Q. How many freight trains did you run?

A. They ran one freight train. It made two round trips a day.

Q. Did you bring it over into Kansas City, Missouri?

A. No, sir.

Q. It never came into Kansas City, Missouri, at all, did it?

A. No, sir.

Q. No freight—so far as you know, of course, no freight could be put on that car in Kansas City, Missouri, if the car didn't come over?

A. No, sir.

Q. This freight that you received that was marked from Kansas City, Missouri, and Kansas City, Kansas, had been carried to Chelsea Junction in some other way? Is that correct?

A. To 4th and Minnesota, on a wagon they hired steady.

Q. It was carried on a wagon to 4th and Minnesota?

A. Yes, sir; the Kansas City Western had it employed.

96 Q. Do you know who employed that wagon—if you don't know you can't testify. Are you testifying to things you don't know—it was hauled there in wagons?

A. Yes, sir; a D. A. Morr wagon.

Q. That is the transfer man?

A. Yes, sir.

Q. And there it was put into this freight car that you say you ran?

A. Yes, sir.

Q. And those were the packages you speak of having been marked from some place in Kansas City, Missouri, to some place in Kansas?

A. Yes, sir.

Q. Now, when you ran a passenger car you would go to 18th and Central—you knew that was the end of the Western line?

A. Yes, sir; the Kansas City Western.

Q. What became of the conductor who was on your car at that place?

A. He is supposed to stay on the car.

Q. Did he stay on the car or not?

A. Why, yes.

Q. And did that same conductor stay on the car and run the car on down?

A. No; the Metropolitan conductor.

Q. The Metropolitan conductor came on the car at that time?

A. Yes, sir, at 18th and Central.

Q. And then you came on the Metropolitan tracks, off the Western tracks and the Metropolitan conductor was there and came on the car and took charge of it?

A. Yes, sir.

Q. And you didn't come on the tracks until he got in the car?

A. No; he was always there ready to get on.

97 Q. After the Metropolitan conductor got on the car, who gave the signals to start the car and stop?

A. Lots of times our conductors did that.

Q. You know the Metropolitan conductor was there running the car?

A. He was there collecting fares.

Q. He would collect fares and he was running the car, wasn't he?

A. No, sir; I was running the car.

Q. Sometimes your conductor didn't even stay on the car?

A. My conductor stayed on the car, but sometimes he would get off, over in town, before going around the loop.

Q. Sometimes he would get off here and do errands and catch the car?

A. I never knew of his doing errands.

Q. They would get off and the car would be taken around over parts of the city without any conductor on there at all but the Metropolitan conductor?

A. That wasn't done very often, that is, to my knowledge.

Q. It was done, wasn't it?

A. I have seen them do it. My conductor got off once in a great while. They would get off—they would send mail down here and they would get off and deliver the mail.

Q. As a matter of fact, don't you know, Mr. McAdow, that at the time that car got onto the tracks of the Metropolitan at 18th and Central that the Metropolitan conductor was there on the car and in charge of the car?

A. He was there on the car and collected fares.

Q. In charge of the car?

A. Of course he is supposed to give bells.

98 Q. Don't you know—I want an answer, yes or no. Don't you know he was there on the car and in charge of the car?

A. Well, I wouldn't say that. I suppose he was in charge of the car, he collected the fares.

Q. How many years did you run over the line under these conditions?

A. Well, I ran about four years.

Q. And on every trip, when you got on the Metropolitan tracks there was a Metropolitan conductor there to take the car?

A. Every one.

Q. Do you mean to tell the jury you don't know who had charge of the car when you had run it for four years under those conditions?

A. My conductor was there and the Metropolitan conductor, both.

Q. Just answer my question, yes or no, and make any explanation you wish.

Mr. ATWOOD: I know Mr. Cowherd doesn't mean to be rude to this man, but I insist that he let him answer the question, and if his answer isn't satisfactory he can move to strike it out and then Your Honor can pass on these things.

Mr. COWHERD: I think I am entitled to an answer, yes or no.

The COURT: If he knows, he may answer.

A. I was supposed to run the car on bell signals.

The COURT: He didn't ask you that. The question is who had charge of the car.

A. I suppose—but to come to knowing, I won't say I knew it.

99 Q. You ran that car for four years over that road?

A. About four years.

Q. Making perhaps your round trip every two hours?

A. No; four hours.

Q. And after four years you never knew who had charge of your car and who you were taking orders from while you were running over the tracks in Kansas City, Missouri?

A. I was supposed to run by the signals.

Q. Answer the question—you ran that car how many round trips a day?

A. Three round trips.

Q. Three round trips, for four years, over the streets of Kansas City, and you never knew who was in charge of that car? Is that true or not?

Mr. ATWOOD: I will object to his repeating the same question over and over, as an unnecessary consumption of time.

The COURT: Answer it once more—again.

Q. (Read by stenographer.) Well, sir, to know it, I don't know it—that he was in full charge of the car. If my conductor had orders——

Mr. COWHERD (interrupting): I object to what his conductor had. Those orders were in writing and that is the best evidence. It is hearsay. I move to strike out any statement about orders given to the conductor unless he saw them.

A. I read the orders.

Mr. COWHERD: I move to strike it out as not the best evidence.

The COURT: Strike it out.

100 Q. You say that when you would come on the tracks at 18th and Central, you would get no other order except those that Royal had given you when he would say "Go to Missouri"?

A. No, sir.

Q. You would get signals all the time?

A. I would get bell signals. I would get the bell to stop and two bells to go ahead.

Q. And if anything occurred—the car got out of order or anything of that kind, somebody would tell you what to do, wouldn't they?

A. Sometimes we would call some of the Metropolitan men down to repair them, or something of that kind; but a motorman generally took care of his car. Once in a while there was a breakdown so bad he couldn't.

Q. And then the Metropolitan came and took care of it, didn't they?

A. They sometimes came down and tried to fix the car up.

Q. And if your cars got out of shape, there were certain places where the Metropolitan kept them for an hour or two, didn't they?

A. Yes, sir.

Q. On dead tracks—all of which you knew?

A. Yes, sir; we went onto a dead track.

Q. And the dead track was set out by the Metropolitan for that purpose?

A. I don't know whether it was set out for that purpose or not, it was on their tracks.

Q. It was one of their tracks and they would take you out there and put you on that?

A. Yes, sir.

Q. Now, Mr. McAdow, on this morning in question your last order was given you at Bethel?

A. Yes, sir.

101 Q. And what was it the dispatcher said to you at that time?

A. Run to Wolcott, and come as quick as you can.

Q. You say there was a thick, heavy fog?

A. Yes, sir.

Q. And that track was one where you would usually watch out for people and obstructions that were likely to be on the track?

A. I always whistled for the tracks where I knew where the crossings were, and sometimes there were people going along and you would slow down for people—you knew about where they were always at—you could tell by the tracks where you were.

Q. Am I right or wrong—I may have misunderstood you—that on your direct examination you said you had to watch that track along there because people were likely to walk on the tracks?

A. Yes; sure; we would have to keep looking ahead.

Q. Then in making that run you knew you were on a part of the road where people were likely to be walking on the tracks?

A. Yes, sir; that is the reason I was looking ahead all the time.

Q. And you had to run your car with knowledge of that fact that you had to look out for these things?

A. Certainly.

Q. And on this particular morning there was a dense, heavy fog?

A. Yes, sir.

Q. And how far ahead could you see?

A. Oh, I couldn't say—not over 30 or 40 feet, I don't think, to tell the truth.

Q. If you couldn't see over 30 or 40 feet, you were running
102 so fast you couldn't stop or slow up in that distance, could you?

A. No; I couldn't slow up in case we should run into anything; but every once in a while I would blow my whistle and give warning.

Q. And at the time of the collision you were going, you think, at 45 or 50 miles an hour?

A. Yes, sir.

Q. And it was down hill?

A. Yes, sir.

Q. And you had your power off, did you?

A. Yes, sir; I had throwed the power off.

Q. You were running without power?

A. Yes, sir—what we call coasting.

Q. Coasting down hill at about 45 or 50 miles an hour?

A. Yes, sir.

Q. Now, you say the first thing that attracted your attention was the flash of your headlight?

A. On the corner of the approaching car.

Q. And immediately or very shortly thereafter you saw the flash of your car on the glass?

A. Yes, sir.

Q. You had no power to throw off, because that was already off?

A. That was already off.

Q. You then threw on the brakes?

A. Yes, sir, the air brake.

Q. You did that with your hand—you had your hand on that?

A. Yes, sir; I always keep my hand right on the air lever.

Q. You threw the brake that sets the air on your car?

A. Yes, sir.

Q. And turned to go through this window?

A. I did.

Q. Which, as you said, was an open space or panel there?

A. Yes, sir.

103 Q. About how wide—three feet wide?

A. Oh, no.

Q. Two feet wide?

A. I don't know just how wide the window glass are—they ain't as wide as those windows there, hardly.

Q. These windows there are something over two feet, are they not?

A. They look like it, from here. They are not as large as that window.

Q. About how wide—give us your best impression—not hardly that wide?

A. No, sir; I don't think they were over 30 inches, as near as I can recollect.

Q. You are giving your best impression, of course—you know there were three of those glass there, across?

A. Yes, sir.

Q. And the width of the car was those three glass, except little spaces between?

A. Yes; the frame work to frame the glasses in.
Q. Now, you turned to go through this?
A. Yes, sir.
Q. This glass?
A. Not through the glass.
Q. I mean through the window space?
A. Yes, sir.
Q. The glass was down?
A. Yes, sir.
Q. Whether you got through or partly through before the crash, you don't know?
A. I just got, as near as I can remember, about this far through (showing) my head into the window, when the crash came.
Q. You had your head and shoulders partly through?
A. Something like that, as near as I can remember.
104 Q. Now, when you next regained consciousness, you were sitting up on a seat?
A. I was sitting on the corner of the seat, the first seat inside of the smoker door, from the coach proper.
Q. You were sitting up there?
A. Yes, sir.
Q. And what you remember first is some passenger saying to you "Mac, here is your cap"?
A. Yes, sir.
Q. And handed it to you, which you put on?
A. They put it on, I didn't put it on, they put it on for me, whoever it was.
Q. And then you got up and walked out of the car and walked back to the end of the car?
A. Yes, sir.
Q. And got out and looked around there?
A. I did.
Q. And were out on the ground for how long?
A. I wasn't there but a very short time.
Q. Five or ten minutes?
A. Oh, no.
Q. Five minutes?
A. I wasn't there over two or three minutes. Just long enough to see, and then the misery began to hurt me so I walked back to the steps and tried to get up on the step, and then I had to holler for help.
Q. Some gentleman helped you?
A. A couple of them.
Q. And then you went in, and did you say you laid down or sat up?
A. I had to sit up. They tried to lay me down, but I couldn't stand it.
Q. This work car ran up to what station?
A. I don't know to what station—it ran up to where we got off.
105 Q. When you got on the other car?
A. It went to Wolcott.

Q. And then some other car came up there—did you go through on the work car to Leavenworth?

A. No; they put us on another car.

Q. Did they have a stretcher there to put you on?

A. No, sir; I sat this way—they carried me into the coach.

Q. Who carried you, do you know?

A. No, I don't. This is the day I had to sit on the seat, as I told you before—this is the way I had to sit all the time.

Q. When you got to Leavenworth did you want to go home or go to the hospital?

A. I wanted to go home from Wolcott. I wanted them to take me home. I even asked Richardson to send me home from Wolcott.

Q. Didn't they suggest you were hurt and you had better go to Leavenworth?

A. Mr. Richardson said, "Mac, you had better go to the hospital."

Q. You insisted there was no reason for going to the hospital?

A. I said I wanted to go home. I didn't state that there was no reason for me not going to the hospital at all. I said I wanted to go home.

Q. When you got to Leavenworth where did the car stop with reference to the hospital—at what point?

A. They pulled over to the barn there, on Spruce Avenue.

Q. How did they get you from there to the hospital?

A. They carried me out and put me in a taxicab, with Mr. James Worsfold—they put us in a taxicab.

106 Q. You stayed at the hospital from the 18th of December until the 2nd of January?

A. Yes, sir.

Q. How did you come to leave?

A. I wanted to come home, and so they sent a hack to the hospital and took me to 3rd and Delaware and put on the car.

Q. You came at your own request and suggestion?

A. Yes, sir; I wanted to come home all the time. I asked the doctor if I could come home—he said, well, now, McAdow, if you don't get any worse I will let you go home tomorrow. I said, I am awful glad of it.

Q. Who were the doctors that you said waited on you at the hospital?

A. Dr. Combs, they told me was the name of the doctor, and Dr. Vaughan—that is the first day when I got to the hospital.

Q. Which one told you you had two broken ribs?

A. Dr. Vaughan.

Q. What did Dr. Combs say about it?

A. I don't remember that he said anything.

Q. He had examined you?

A. Dr. Vaughan was the one that done the examination.

Q. Dr. Combs was there?

A. Yes, he was there and helped to undress me and seen me. They put a gown on me.

Q. Both waited on you during the time you were in the hospital?

A. Oh, no, that is the only time I ever saw Doctor Combs, was

then and when they put the plasters on me—I never saw Dr. Combs since.

Q. Now did Dr. Vaughan see you daily while you were at the hospital?

A. Yes, he came to see me daily.

107 Q. And on the 2nd of January he told you you could go home?

A. Yes, he told me the day before, if nothing set up—anything serious—this was on the first of the month—that I could go home the next day.

Q. Did he tell you when you would be able to go back to work?

A. No, sir; not that I remember.

Q. Did he say anything to you about going back to work—when it would be better for you?

A. If he did I don't remember it.

Q. Did he tell you to do no work of any kind from that time to this?

A. No, sir; I can't do any work—I can't dress and undress.

Q. Did you attempt to exercise your arms and lift anything or walk or anything of that kind?

A. No, sir; nothing more that what I showed you.

Q. Dr. Stemen called on you?

A. Yes, sir.

Q. He made an examination of you, didn't he?

A. Yes, the same as Dr. Combs. He came and thumped me on the breast and thumped me on the back, and put his ear as though listening on my lungs.

Q. You had adhesive plasters on you?

A. Yes, sir.

Q. He pulled them off?

A. Yes, sir. And listened to my lungs.

Q. That was after you got home, was it, from the hospital?

A. Yes, sir; I think that was about the 30th day.

Q. After the accident?

A. Yes, sir; something like that.

Q. Then Dr. Smith you called in?

A. Dr. Joy, first.

108 Q. And Dr. Joy attended you for about how long?

A. Well, right up to the present date.

Q. Then when did you call in Dr. Smith?

A. I don't know the first visit he was there—I can't remember the date.

Q. Was that before or after you had called Dr. Joy?

A. After—Dr. Joy was the first doctor outside of the company doctor.

Q. Dr. Smith called on you while Dr. Joy was attending on you?

A. Yes, sir; when I couldn't get one I called the other, on account of the misery.

Q. How many times did Dr. Smith attend on you?

A. I couldn't say, he was out there three or four different times.

Q. Some three or four different times, at your request?

A. Yes, when we needed him we called him.

Q. Did Dr. Smith put any bandages or plasters on you?

A. No, sir, he gave me medicine.

Q. Now Mr. Atwood asked you about some rule of the company—where did you see that rule?

A. What rule was it?

Q. It was the one Mr. Atwood read to you.

A. You read the rule and I will answer.

Mr. ATWOOD: About the operator keeping a time card.

A. They had a strict order in regard to keeping the time cards with you all the time while on duty.

Q. Where did you see that rule?

A. Posted on the bulletin board at 3rd and Delaware—also at Wolcott, and Chelsea Junction. That is where they post their orders.

109 Q. Was it a part of your duty to go and look at these orders?

A. Yes, sir; you were supposed to look every day for these orders. They post different orders and you are supposed to look daily for them.

Q. Well, you said something about running your car in accordance with the rules of the company—where did you get those rules?

A. Out of the time card, and also J. W. Richardson, the superintendent.

Q. When did you get any rules from Mr. Richardson?

A. He instructed me on this when he hired me.

Q. What kind of rules were they, written or printed?

A. That was verbal; and he would put up written orders on the bulletin boards in those three places—Wolcott, 3rd and Delaware, and Chelsea Junction.

Q. This time Mr. Richardson instructed you was when you went to work for the company?

A. Yes, in 1906.

Q. And did he tell you what the rules of the company were, at that time?

A. He did.

Q. Did you see a copy of them?

A. Yes, I have seen a copy of the rules; they have on the bulletin board different rules.

Q. Did you see a copy of them at the time Mr. Richardson told you what they were?

A. Not when he told me. I didn't see them until afterwards—then he turned me over to a motorman to break in, and I received instructions from him too.

Q. Did the motorman give you a copy of the rules?

A. These rules were on the bulletin board, where he wrote them and signed his name.

110 Q. How many rules were there?

A. I don't know how many different rules; and he would post up a new rule every once in a while.

Q. It was a part of your duty, you say, to keep a book with the rules in it?

A. Yes, sir; and your duty was to look at the bulletin board every day and see if there was any new orders.

Q. And you did that during the four years you were there?

A. Yes, sir; that was our instructions—we had them at all three places.

Q. Were all the rules of the company placed upon this bulletin board?

A. Yes, sir; besides that they have got the rules, nearly as large as the top of this desk, in a frame. Of course they were printed too after I got there.

Q. How long after you were there?

A. I couldn't say how long.

Q. Where were they kept?

A. At Chelsea Junction, and Wolcott and Fort Leavenworth and 3rd and Delaware.

Q. And every motorman must have those rules?

A. Those were the orders.

Q. And you did that?

A. Yes, sir.

Q. You knew what was in those rules?

A. Yes, sir; and the rules were also in the time card—in regard to running the cars.

Q. Do you remember rule No. 52—was that rule posted there in the way you have described?

A. Well, I couldn't read the rules off by the numbers.

Q. It is the next to the last rule?

A. I couldn't read the rule off on the back by number.

111 Q. I will read it to you—"Motormen when running on the Metropolitan Street Railway Company's tracks are working for the Metropolitan Street Railway Company, and are subject to all of their rules and regulations governing the Metropolitan employees. You must keep posted as to the rules and regulations governing the cars on the tracks where the Kansas City-Western cars run."

A. Yes, sir; that rule was there.

Q. And of course you knew that during the time you were working?

A. Yes, sir; that was the rule.

Redirect examination by Mr. ATWOOD:

Q. About two months ago what about any sickness did you have?

A. I had one of these hard spells of misery, you know, and I called in Dr. Joy. That was the 7th of December; and he commenced working with me about 5:30 in the evening, and I didn't get any relief until twelve o'clock. He came to my house three times that night.

Q. How long did that particular bad spell last?

A. I got easier about midnight, but still I was in the house four or five days.

Q. Did you have headaches?

A. Yes, sir; I have had headaches—indeed I have.

Q. In the petition something is said about sight and hearing. What about that being affected—one or the other?

A. I can't hear without difficulty.

Q. How was it before?

A. My hearing was always good; and of course my sight—well, I couldn't read without glasses—that is, fine print; but it has got to be very coarse print if I read it now without glasses.

112 Q. Is there any difference in your sight since the acciment?

A. Yes, there is. I can tell.

Q. Of course a man past 45 has to wear glasses.

A. Yes, sir; but there is a difference. My eye-sight isn't as good.

Q. Now how much were you earning at the time of the accident?

A. The amount of wages?

Q. Yes, sir.

A. I was making $2.64 a day—twelve hours a day, at twenty-two cents per hour.

Q. I notice you are restless. Are you obliged to be restless that way?

A. Yes, sir; I sit with my back and shoulders this way (showing) it keeps hurting me.

Recross-examination by Judge MOORE:

Q. Your shoulder was never put in any kind of splints, for any break?

A. Dr. Vaughan used this plaster adhesive—whatever you call it.

Q. Adhesive plaster?

A. Yes, sir; on strips, he put it on here and around on my shoulder and into my back; and then two or three days afterwards I called him—I couldn't stand the misery—and he came and said "What is the matter McAdow?" I said "my shoulder, it seems to me it is mashed to pieces—you will have to do something"—and he took those plasters off and extended them further both ways.

Q. Did he ever put your shoulder up in any kind of splints?

A. No, sir.

Q. You had a kind of bruise on your head—where was that?

A. Just about here (pointing)—it wasn't very long—probably an inch, more or less—and then this side of my nose.

113 Q. Take this one on your head—what was done there?

A. They shaved the hair off and cleaned the dust out and put medicine on it?

Q. No stitches were taken in it?

A. No, sir.

Q. No treatment of the scalp or fracture of the skull?

A. No.

Q. And you say you were a little scratched on your nose?

A. Just the skin off from the side of my nose.

Q. And the only external evidence of any injury you had, Mr.

McAdow—I mean by that, the only thing you could see, that you could look at, was here on the side of your head and the skin off your nose?

A. That was the only place that the skin was broken.

Redirect examination by Mr. ATWOOD:

Q. You couldn't look at your back, could you, Mac?
A. No, sir.
Q. What about being nervous before this accident?
A. I wasn't nervous.

Recross-examination by Judge MOORE:

Q. You had been running as a motorman for this company—had you run on other roads before this?
A. Yes, sir; I hired in September, to the Metropolitan.
Q. That was the first time you ran as a motorman on any road?
A. Yes, sir; on any street car at all.
Q. So from 1902 to 1911, the seven years had been your experience?
A. No, that would be a little over nine years.

114 Miss NANNIE MCADOW, having been duly sworn as a witness for the plaintiff, testified as follows:

Direct examination by Mr. ATWOOD:

Q. You are Mr. McAdow's daughter?
A. Yes, sir.
Q. You live with him and your mother, in Kansas City, Kansas?
A. Yes, sir.
Q. And work over in town—in Kansas City, Missouri?
A. Yes, sir.
Q. At the Jones Store?
A. Yes, sir.
Q. Tell the jury what you have noticed since your father's injury as to his suffering pain—tell these gentlemtn?
A. Well, it seems like he is nervous—and his shoulder, one of them is higher than the other one. It seems like his shoulders are not like they used to be—they are kind of bent down—they are not like they used to be, at all.
Q. You sleep at nights—you don't know whether he is up and down?
A. He is up. Lots of nights in summer I could hear him walking from his room into the hall, from our room. He couldn't sleep. It seemed as if he was in misery. It was so fierce he couldn't sleep.

Mr. COWHERD: I think the witness ought to be instructed to just state what he does.

Q. Just state what he does. His being up at nights that way is frequent or infrequent?

A. It is kind of frequent.
Q. Now who helps him dress and undress?
A. My mother and I do, both.
115 Q. How about putting on his suspenders?
A. We do that.
Q. And his coat—and fixing his collar and things like that?
A. Yes, sir.
Q. It would be done by you and your mother?
A. Yes, sir.
Q. Have you ever heard him give expression to pain—not what he said, but expressions that indicate pain?
A. Yes, I have heard him.
Q. Frequent or otherwise?
A. Well, it is pretty frequent.

Cross-examination by Mr. COWHERD:

Q. Does he help in the work around the house?
A. No, he does not.
Q. He never does anything like washing dishes or bringing in coal?
A. He helps a little bit. Just easy, around, you know.

Mrs. MAY POND, having been duly sworn as a witness for the plaintiff, testified as follows:

Direct examination by Mr. ATWOOD:

Q. You were sworn, Mrs. Pond?
A. Yes, sir.
Q. You live in Lansing, or near Lansing, Kansas?
A. Yes, sir.
Q. You came down here at Mr. McAdow's request, without any subpœna?
A. Yes, sir.
Q. I will ask you if you lived neighbor to him at any time after that collision on the 18th of December, 1911?
A. I did.
Q. How long was it you were close neighbors?
116 A. I moved in there on or about the middle of March, 1912, and moved from there on or about the first of October, 1912.
Q. You are a married woman?
A. Yes, sir.
Q. Your husband is engaged in what business?
A. He is a foreman in the U. P. yards.
Q. At Lansing?
A. No, sir; here. A switchman foreman.
Q. How close neighbors were you to Mr. McAdow during those months, between March and October?
A. I think our houses were about fifteen feet apart.
Q. Did you see him frequently during that time?
A. I should say I saw him every day.

Q. Pretty near every day?
A. Yes, sir.
Q. Tell the jury anything that would indicate his physical condition—how he was?
A. I saw him more times than I can tell you, moving around in the yard and sitting on the swing, and he would be sitting reading and he would drop his paper, and he would draw himself over to the place, and I have heard him moan in the night. I saw him go out to the mail box and he would reach up to get the letters and maybe he would get them in his hand and would drop them again. And there was a look of terrible agony on his face.
Q. Were you there at any time when he had a particularly bad spell?
A. In July some time he had an awful bad spell, in the swing one day, and his wife took him in, and I thought he would die. He groaned awful bad, and a cold sweat came over his face—he looked terrible bad that time.
117 Q. What about dressing and undressing him—whether his wife did it or not?
A. Yes, sir; she did. He couldn't do that at all. Maybe she would be down at the garden and he would be at the house. He would have to go to the garden for her to help him undress and take down his suspenders—he couldn't do it.
Q. They had an old fashioned sanitary arrangement out there?
A. Yes, just old fashioned.

Cross-examination by Mr. COWHERD:

Q. Mr. McAdow was up and around every day, wasn't he?
A. Not every day—some days he wasn't out of the house.
Q. Some days you didn't see him?
A. Yes, sir.
Q. When you saw — he was out around the house?
A. Yes, sir.

JAMES WORSFOLD, having been duly sworn as a witness for the plaintiff, testified as follows:

Direct examination by Mr. ATWOOD:

Q. Your residence is where?
A. Kansas City, Kansas.
Q. And your business?
A. I am a painter.
Q. You were there on the car when this accident occurred, on the 18th of December, 1911, on the day Mr. McAdow was hurt?
A. Yes, sir.
Q. Where did you board that car?
A. 18th and Central—Kansas City, Kansas.
Q. And your destination purpose was to be what?
A. Wolcott.
Q. Did they stop at Bethel?

A. They did.

118 Q. What about the weather—as to its being foggy or otherwise?

A. The weather was somewhat foggy and frosty.

Q. After they left Bethel, shortly before or at the time of the collision, are you able to state about what the rate of speed was?

A. After we left Bethel?

Q. When you first started, you started slowly, of course—but about the time of the accident, I mean?

A. I can't say. They were running at the limit of speed they were allowed to run on good tracks. I should say 35 miles an hour.

Q. What were you doing at the time of the collision?

A. I was sitting in, I believe, the second or third seat back in the ladies' compartment.

Q. Mr. McAdow was the motorman of the car?

A. Yes, sir.

Q. When the collision came did you lose consciousness for a time?

A. Well, I should think I did.

Q. When you came to, what were you able to do or observe?

A. Well, the first think I knew I was pulling myself out from under the seat in front of me—the seat I was sitting in tore loose and several others, I don't know how many, I wouldn't say, came loose also. My seat tearing loose struck me in the back—on the back bone—tearing the ligaments loose.

Mr. COWHERD: We are not trying Mr. Worsfold's case.

Mr. ATWOOD: Anything that shows the intensity of the collision bears upon the question of how much the collision might do to hurt Mr. McAdow.

119 Mr. COWHERD: I object to the testimony about the injuries of this witness as incompetent and immaterial to any issue in this case.

Mr. ATWOOD: Let it be withdrawn—about the description of his injuries.

Q. When you came to yourself, what did you do? What did you say?

A. When I came to and got upon my feet as best I could, I was certainly somewhat dazed, because this part was torn off and dropped down (indicating). I found something coming down that I thought was water. It was blood. Of course I took care of myself the best I could, and got out of the car the best I could. Well, one man fell down in front of me, that was injured, and I dragged myself that distance to Wolcott——

Mr. COWHERD (interrupting): I object to this.

Mr. ATWOOD: It may be stricken out. The witness isn't intending anything unfair. He has added some things that I will agree is incompetent.

Q. Well, now, did you observe the condition of the cars—were they telescoped and smashed up?

A. Yes, sir.

Q. Describe that?

A. To the best of my knowledge, as I passed by the car, which I did—the car that I was in, being the higher of the two, had the other car sheered back. It looked to me it sheered it back, from the force, clear back to the partition.

Q. You mean the partition between the smoking compartment and ladies' compartment?

A. Yes, sir.

Q. I speak of it as ladies' compartment—of course men
120 and women sat in it?

A. It isn't exclusive—sometimes ladies sat in the smoking compartment, but not often.

Q. When did you next see Mr. McAdow after the collision?

A. Well, this happened, as far as I can tell—I took out my watch just before the collision and I suppose I had just put it back when the collision came, and I noted it was five minutes past seven. The next time I saw McAdow I believe was about eleven o'clock, when we were put in the car to go to the hospital—the Cushing Hospital, at Leavenworth.

Q. What did you observe about his condition, as to whether or not he got into the car alone, or how it was?

A. It would have been impossible for him to have got into the car.

Mr. COWHERD: Objected to as a conclusion and opinion of the witness and I move to strike it out.

Mr. ATWOOD: That is agreed to.

Q. State whether or not anybody assisted you in getting on the car or whether you got on by yourself?

A. Yes, I had a man with me—I can't call his name now—perhaps if someone would mention it I would know it.

Q. What did you observe during the ride to Leavenworth, if anything, about McAdow's condition?

A. He was groaning all the time we were going in; could hardly sit on the seat, and was being held, practically, in the arms of other parties.

Q. You have spoken of being injured yourself. You have no litigation pending with the company?

A. No, sir; I am through. I am here to tell the truth and nothing but the truth.

121 Cross-examination by Mr. COWHERD:

Q. Were you groaning all the time going up there?

A. I don't know that I was all the time but I expect I was the greater part of the time.

Q. The ligaments of your back were torn, etc.?

A. Yes, sir.

Q. Did you see any evidence of any kind of an injury on Mr. McAdow, except a little cut, a scalp wound, and the skin broken by the nose?

A. That was about all I saw; because his clothes covered everything where he was injured.
Q. You never saw him examined when his clothes were off?
A. No, sir.
Q. What is your business?
A. I am a painter—I was working for the company, going out to work that morning as I had been for five years previous.
Q. What is your business now?
A. I haven't done anything since.
Q. You were not at work?
A. No, sir.

Dr. G. W. ROBINSON, having been duly sworn as a witness for the plaintiff, testified as follows:

Direct examination by Mr. ATWOOD:

Q. What institution, medical or otherwise, are you a graduate of, doctor, or have you attended as a student?
A. I primarily graduated from the Beaumont Medical College of St. Louis, graduate of the Post-Graduate of the Fordham University of New York, and have taken courses at the Neurological Institute of New York.
Q. How long have you been in the practice of medicine?
A. 1896.
122 Q. How long, if at all, have you devoted yourself to the specialty of nerve disarrangement and nerve diseases?
A. During the last six or seven years.
Q. Are you at the head of an institution in this city which devotes itself particularly to the care of those suffering from mental and nervous diseases?
A. I am superintendent of the Punton Sanitarium in this city.
Q. Has your work during the six or seven years you speak of, substantially been given to the study and treatment of people afflicted with a nerve disarrangement?
A. Yes, sir.
Q. Does that include nerve disarrangement that comes from injury as well as disease?
A. Yes, sir; nervous diseases of all sorts.
Q. State whether or not nerve disarrangement which comes from an injury, requires treatment, as well as those coming without it?
A. They do; yes, sir.
Q. State whether or not you have examined many whose nerve troubles have come from injury?
A. I have; yes, sir.
Q. Do you know George McAdow?
A. Yes, sir.
Q. And as his physician you examined him?
A. I examined him, yes.
Q. Two or three times. How many was it, doctor?
A. I think it was three times, altogether; three different occasions.

Q. Do you know what his physical condition is now?
A. Yes, sir.
Q. Now, tell the jury what the result of your examinations were?
123 A. Well, in my examination of him, I gave him a general examination first examining the condition of his organs, including the heart, blood vessels, lungs, kidneys, etc., and I gave him an examination of his nervous system and muscular condition.
Q. What did you find?
A. I found his heart and lungs and kidneys to be in a normal condition, as far as I could determine. In my examination of his muscular system, I examined his ability to move the various muscles of the body. I found he had more difficulty in moving his arms and raising his arms; he raised them very slowly. He could raise them reasonably well, but if he moved them quickly he was unable, I think if at all, because of the pain and the muscular contraction which followed, he had great difficulty in getting his hands to his face, and was unable to raise his arms at that angle that far (showing). He couldn't raise them at all because of the pain and the weakness in his muscles. I tested the strength of his hands and found it was very much below normal. I used a dyn-ometer, which tests and measures the strength of the muscular contraction of the hands. With the left hand he could advance the dyn-ometer to fifteen; and with the right about forty.
Q. What is the normal?
A. I think the average may be about one hundred and twenty-five. Some have over 200, but the average is about 125. I examined his reflexes; the involuntary contraction of certain muscles; when we strike them; and his reflex of the shoulders was gone—the reflex of his arm—his elbow reflex, and the reflex over his abdomen, the superficial reflexes were entirely abolished.
124 Q. Stop an instant. The most of these reflexes are objective or subjective—are they within the control of anybody?
A. They are not within the control of the patient, no. The muscles contract involuntarily. For instance, if a person strikes here, you have a patella reflex of the knee. He would have no power to control it. If your attention was centered upon that particular point you might, by bringing into contraction certain sets of muscles, be able to control them.
Q. To what extent?
A. Well, almost entirely. But if your attention wasn't centered upon that, you could not. In testing Mr. McAdow's shoulder reflex, I struck him over the back. He didn't know that I was going to do that, and had no power to bring under control that set of muscles to prevent contraction when the muscles were irritated. This reflex over the abdomen, there is virtually no control over this—the patient can't control them by voluntary action at all.
Q. But you say there are some reflexes that can be controlled in a measure?
A. Yes, sir.
Q. And others cannot be?

A. Yes, sir.

Q. This abdominal reflex?

A. You can't control this. His knee reflexes were not disturbed nor were the reflexes of his ankle. Then I examined the condition of his nervous system——

Q. Before leaving that muscular matter, what about the test of an electric current?

A. I neglected to speak of that. I tested his shoulder muscles with an electric current—*Fedaric* electricity we call it. I found in order to get a contraction here I had to apply over the left
125 side thirty volts, and on the right thirty-five. The muscles lower down in his arms were not so bad.

Q. When you speak of the application of a current, state what it does to a healthy muscle?

A. It gives a contraction.

Q. Can that be controlled by the patient in any way?

A. It cannot be.

Q. It is like when a man takes hold of an electric battery?

A. He can't control it.

Q. In this instance you had to apply how many volts?

A. 30 and 35.

Q. How much would a healthy muscle require to make it respond?

A. Well, a voltage of 15, in the muscles of the arms. The muscles over his shoulder are wasted slightly.

Q. What do you call that in medical terms?

A. Muscular atrophy. This test is used in conditions of that sort to determine whether or not there is a degeneration of the muscular development.

Q. The electric current is used for the purpose of determining whether there is muscular degeneration?

A. Yes, sir.

Q. Where they should respond with 15, it took 30 to 35 to get any response?

A. Yes, sir. That was my experience with Mr. McAdow.

Q. Go on.

A. And in addition to that, I tested the condition of his sensory nerves by applying various tests to the skin. I found that over his shoulders and neck and over most of the entire trunk there was a considerable decrease in his ability to appreciate a sharp
126 point—a pricking sensation. It was considerably decreased.

Q. Stop there to explain the sensory nerves—they are what nerves?

A. They are those that transmit impulses of sensation.

Q. That is, the feeling nerves?

A. Yes, sir; feeling and touching, and things of that sort.

Q. What superficial nerves are those?

A. Those in the skin.

Q. They are distinct from the deeper seated nerves?

A. Yes, sir.

Q. You spoke of the superficial nerves and those around the shoulder and neck.

A. Over those areas he was unable to appreciate a pin prick with a normal amount of pressure applied to it.

Q. What name is given to that condition?

A. Well, it would be a condition of analgesia—decreased sensibility to pain.

Q. That was the surface nerves?

A. Yes, sir.

Q. How large a zone of his body were the surface nerves in that condition?

A. There is of course the shoulders and arms, and over his trunk, both front and back sides, down what is called the lumbar region, down almost to his buttocks; that is the lumbar area.

Q. That is the lower part of the back?

A. Yes, sir; with only one slight exception, at the third, that is, the area supplied by the third dorsal segment, wasn't so badly affected as it is in the other area.

Q. Now describe about his ability to appreciate the touch over those areas?

127 A. I found a considerable decrease, over his shoulders especially, a weight applied on the skin of half a gramme; I was unable to get instant response, with as much as 40 to 41 fractions of a half in weight applied over those areas, showing quite a marked decrease in the touch sense over those areas. I also over those areas used what is termed the compass test, applying the two points separated at different distances.

Q. What is the separation?

A. That depends on the area, over the fingers is the most acute area of the body, and the palm of the hands, and face. You can't get an appreciation of the two points by touching him over the back and arms at the usual distances—you don't get an instant response.

Q. This discloses a healthy or unhealthy condition?

A. It is an unhealthy condition of the nerves.

Q. Not a natural one?

A. It isn't a natural condition. To explain more fully, this is what we term the compass test. In applying these points the patient will show the appreciation on one of the two points if he is normal, and not if he is abnormal. The nerves are not properly performing their functions; there is no sensation over the surface of his body of appreciation of pain on the normal separation of the points—you have to separate it much further in order to get him to appreciate touching him with the two points.

Q. For illustration's sake, if for instance that would be the proper distance between the points, to get a normal response, you couldn't get the response except you carried it out like that (showing); is that what you mean?

A. Yes, sir. That would be an abnormal condition of the skin.

128 Q. What about the deeper muscles, the tenderness of them?

A. I found over all these areas there was considerable deep tenderness on ordinary pressure; it required much less pressure over those areas to get a painful response than the normal. He was very tender over all those areas.

Q. Right over the very part of the back where the nerves of the skin on touch, it was less than it should be, down in the tissues there was greater tenderness?

A. That is right.

Q. What did that disclose if anything, that soreness of the deep-seated nerves?

A. It indicated to me an inflammation, an inflammatory condition of his muscles and of his deep nerves. We have the nerves in the muscles that transmit pain sensation, and it indicated there was inflammatory condition in these areas, that is, over these areas of the muscles and the deep nerves.

Q. What did you find as to the extent of that area of the body if you would indicate on me the parts of the body?

A. Well, over his back and shoulders and arms, and down to his hips, I should say down to the hips—I found this area, except a very slight area in here (pointing) in which the appreciation of pain was better than it was in the rest.

Q. The rest of it showed abnormal dullness?

A. Yes, sir.

Q. Now, where are the regions of inflammation in the deep-seated muscles?

A. It was all over the entire trunk, including this area of the shoulders and his arms.

Q. Now, what does the presence of the atrophy that you
129 have spoken of mean, speaking from your study and experience as a student in these medical matters; would that matter be progressive or otherwise?

A. The condition of muscular atrophy in his case?

Q. Yes, sir.

A. Well, judging from his condition, I should consider it to be of a progressive character.

Q. Taking into consideration that thirteen months had elapsed since the time his said injury was received, and considering his condition as you have it in mind in that lapse of time, what does that disclose in your opinion, or what is your opinion as to the likelihood of the trouble that he has being progressive or curative?

Mr. COWHERD: By his trouble, do you mean simply the atrophy of the muscles?

Mr. ATWOOD: I am speaking of his nerve condition generally.

Mr. COWHERD: I object to that for the reason that the scope of the question is not broad enough for the doctor to pass an opinion upon it.

Mr. ATWOOD: If you will suggest where you think it is wrong, I will be glad to change it; I want to get it right.

Q. The question was, considering the condition in which he was found by the doctor, and taking into consideration in connection

with that, that 13 months had elapsed since he received such injury as he did receive, state whether or not that circumstance or those circumstances would indicate to him that the disease was going to progress or was going to get well?

Mr. COWHERD: I object to that because he would have to
130 know what the injury was, and when the injury was received.

Mr. ATWOOD: I think that objection is right.

Q. Now, what does the presence of atrophy indicate, with relation to the disease that causes it being progressive or otherwise, speaking medically, as to whether it is a thing that suggests a continuation or progressiveness, or otherwise, just abstractly?

A. I should say a condition of muscular atrophy when it accompanies a condition such as Mr. McAdow has, or I found Mr. McAdow to have, would indicate a progression of the condition in a case of this sort—that it would be progressive.

Q. If it is progressive, what is the ultimate outcome of the progressive condition of atrophy resulting from nerve derangement?

A. A wasting of the muscles and paralysis and loss of the use of the muscles.

Q. Does it mean ultimate paralysis of the parts affected?

A. If it continues to progress; yes, sir.

Q. Now, doctor, take the case of a man 53 years old, who is a motorman running on an Interurban car between Kansas City, Missouri, and Leavenworth, Kansas, or Fort Leavenworth, Kansas, as he directed its running or was running his car down along a certain track under the custom controlling the operation of the road, that the track he was directed to run his car over was clear and unobstructed and while running his car in obedience to his orders, at the rate of 30 or 40 miles an hour, the car being of the type of street car known as Interurban, the larger type of car, a car 55 feet long and something like 6 or 7 feet wide, and he was running his
131 car as in this question indicated, and his first knowledge of any obstruction was his turning a curve and coming upon a car which was coming in the other direction on the same track and which he meets immediately thereafter and there is a collision; that the portion of the car in which said motorman is, is in a compartment in the front end of the car that he was driving, two and a half feet in its width, and by width I mean lengthwise of the car, because the length of the compartment was the width of the car—being the full width of the car; that at the time of the collision he loses consciousness, and when he comes to himself he finds himself in the rear portion of what is known as the smoking compartment of the car, some 15 or 16 feet from the partition that I have spoken of, and that he gets out of the car, and when he attempts to get into it he finds he is unable to do so without assistance, and is finally taken to a hospital. That he was in the hospital from the 18th of December until the 2nd of January, and left at that time, being assisted in his leaving into the vehicle that conveyed him therefrom. Tell the jury what in your opinion, speaking in the light of your experience and knowledge as a medical man, as to whether or not the conditions that you found in and upon Mr. McAdow, as you

have described here to the jury, could, might or would have been produced from the conditions that I have described in this question, the accident and collision I have described in this question?

Mr. COWHERD: Objected to as not a proper hypothetical question, including facts not testified to, and not including all the facts, upon which to base his answer, and invading the province of the jury.

132 Mr. ATWOOD: I want to have the record show that counsel for plaintiff asks counsel for defendant to point out specifically wherein the question is an infraction of the legal prerogatives, and what is in it that should not be, and what is left out that should be embodied in it.

Mr. COWHERD: The question is so long it is difficult to remember exactly what is in and out; but you have some statements in regard to the car; the description of it; which I don't understand to be in the proof, and it seems to me that the doctor ought to know the condition of the man prior to the time of the injury.

Mr. ATWOOD: I think that is a sound objection.

Mr. COWHERD: And the doctor should first know whether the man received any physical injuries at the time, and if so, to what extent, and what were the evidences of it, and all that kind of information.

Mr. ATWOOD: Your suggestions are sound. I am very glad you suggested them.

Q. This man was, prior to the time of the collision, a man in good health and never had had any serious illness; and that after the collision there was a cut upon the left side of his head, and some slight abrasions upon the face or nose; and from the time of the injury he suffered pain—that is, from the time of the injury or shortly thereafter—after the shock had passed; that while he was outside of the car he began to suffer pain, and was unable to lie down when he had gotten into the car, after he first stepped back into it; and very shortly after the collision was unable to lie down, and when taken to the hospital was unable to lie down except

133 he was propped up with pillows. And that from that time he suffered pain in the region of the body near the shoulder and back, and in that way I convey to you as best as may be, what was done to him by the collision. Now, with these facts added to the question, I would ask whether or not the things I have described as having occurred there, could, would or might have produced the condition that you found when you examined Mr. McAdow?

Mr. COWHERD: The same objection just stated.

The objection was by the court overruled. To which ruling of the court the defendant then and there duly excepted.

A. Conditions of this sort do result from injury; and assuming the facts being true as stated, in my opinion this man's condition is the result of the injury received.

Q. In any event, those conditions might or could have resulted from the things there transpiring, in your opinion?

Mr. COWHERD: The same objection.

The objection was by the court overruled. To which ruling of the court the defendant then and there duly excepted.

A. Yes, sir.

Q. Now, what is your opinion with relation to the permanence of the injury that you found there, the conditions you found, as to whether they are permanent or progressive or otherwise; or give your opinion based upon your knowledge and experience in such matters, together with your observation that you made in your examination?

134 Mr. COWHERD: Objected to as not a proper hypothetical question and assuming conditions not shown to the jury.

The objection was by the court overruled. To which ruling of the court the defendant then and there duly excepted.

A. Considering Mr. McAdow's age, and the duration of the conditions I find at the present time, I believe they will be permanent, and I believe that they will progress.

Mr. ATWOOD: Mr. Stonestreet, in my hypothetical question did I name the date of the collision?

Q. I will include in the question that the collision occurred on the 18th of December, 1911.

A. I understood it to be thirteen months ago.

Cross-examination by Mr. COWHERD:

Q. Taking up these matters in the order you gave them, what do you mean by atrophy of muscles or muscular tissue—it means a waste of muscular tissue, does it not?

A. Yes, sir.

Q. For instance, a man who has been accustomed to work, using his arms, should proceed to put his arm up and hold it that way right along for some time, the arm would waste, wouldn't it?

A. There would be some decrease in the size of his muscles. There would be some decrease both in the size of his muscles and in the hardness of his muscles. But it wouldn't be an atrophy—

135 it wouldn't be in the true sense of the word atrophy, a condition of that sort. The decrease of the size of the muscles through disuse, wouldn't be true muscular atrophy.

Q. Isn't your opinion, as a medical proposition, that any organ of the body, when we cease to use it and cease nourishing it, will waste away?

A. Yes, there is some decrease in the size of the organs.

Q. You found no evidence of any break of the shoulder blade of this plaintiff, did you?

A. No, I did not. I say this—he was so tender that I was unable to make a thorough examination of his bones on account of the extreme tenderness of this area.

Q. The question of tenderness upon pressure, and things of that kind, is largely what you doctors call a subjective symptom, isn't it?

A. To a certain extent, yes.

Q. You have to depend on what the patient says?

A. In a measure.

Q. He cries or flinches when you touch him—you can't tell whether there is real soreness or whether it is a slight soreness except as he indicates it?

A. I wouldn't quite agree with that statement, for this reason, there are other ways of determining whether or not a certain manipulation is causing pain, aside from the statement of the patient. His facial expression is indicative of real pain; differences in the facial expression show when there is no pain and when there is pain. Facial expression and muscular contraction.

Q. Aside from muscular contraction of course the patient's expression is also a subjective symptom?

A. Not entirely so. He can't entirely control facial expression, and especially a painful expression.

136 Q. Isn't it a fact, doctor, that it can be controlled—so much so that it is recognized and is one of the things taught upon the stage, and orators, like my friend Atwood, control audiences by the facial expression?

A. I will say to a certain extent it can be controlled; but there is some involuntary facial expression.

Q. You spoke of using an instrument like this—what do you call it?

A. A compass.

Q. You place it upon the flesh and as to whether the patient receives one or two pricks of the instrument, of course you have to rely upon his statement as to whether he distinguishes one or two, very largely, don't you?

A. Yes, sir; but the method of using that is this, of asking the patient to indicate whenever you touch him; he says one or two; you don't ask him each time; you do ask as to whether or not he feels it.

Q. That is only another form of subjective symptoms?

A. Yes, sir.

Q. Now, doctor, patients suffering with nervous trouble frequently imagine they have trouble?

A. It is possible that many patients do imagine troubles.

Q. More particularly men reaching or passing fifty years of life—you doctors recognize something like a change of life in men, at about fifty, don't you?

A. Yes, some.

Q. Now, exactly following the same conditions as a change of life in women, but accompanied with recognized disturbances generally?

A. There is, yes, a change of life.

Q. And that change comes along about fifty years of age?

137 A. It is variable; that is approximately about the average.

Q. And is it not a fact that you frequently find men at about that age of life, suffering from nervous troubles?

A. Yes, there are nervous troubles that sometimes affect them at that time of life.

Q. And are caused by things entirely outside of the question of injury or traumatism?

A. Yes, we have nervous troubles occurring at that age.

Q. I think I saw where you examined a juror the other day in a case, in which you found that he was suffering from nervous trouble, somewhat like this man—he couldn't raise his arm and cried out when you touched him? That being a man, that had no injury at all, wasn't it?

A. He hadn't had any traumatic trouble; no.

Q. You attributed that nervous condition that you found him in, or this condition that he was in, to some kind of a body disorder?

A. Yes, sir; an exposure to cold, which he had suffered.

Q. Isn't it true that a person who has nervous trouble, and at the same time has a lawsuit pending in court connected with that trouble, is very likely to suffer from it until the lawsuit is ended? In other words, doesn't the fact of a pending suit, affect the mental condition and therefore affect their trouble?

A. I would say that a man who had suffered an injury which he believes has disabled him, perhaps permanently, or even temporarily or lessens his capacity for earning, would worry about that matter until he received what he thought was justice—that
138 he would worry over matters of that sort and it would make him a little bit worse; those things all taken together.

Q. And isn't it a fact that a man, who is in a nervous condition, and has pending a law suit arising out of the facts to which he attributes his condition, very frequently will remain in a nervous state and probably continue to grow worse until the suit is over, and then get better; that is a very common occurrence?

A. There are some causes of nervous trouble accompanying such condition; yes.

Q. Nervous trouble is very largely mental trouble in part, isn't it, doctor?

A. Well no; I should say not.

Q. In that way it is?

A. There are some types of organic nervous trouble—functional nervous trouble, that is partly mental.

Q. A man who has a nervous trouble is likely to have a good many imaginary troubles along with it?

A. That would depend altogether upon the character and nature of his nervous trouble, Mr. Cowherd.

Q. One of the chief cures for nervous trouble, prescribed by you doctors, is some form of employment or exercise that will take the mind of the patent off of matters, is it not?

A. No, I wouldn't say that. Some forms of nervous trouble require absolute rest, others require occupation. You must know exactly what condition he is in, whether you could say that exercise is best or rest is best.

Q. In either case, if possible, you take the patient's mind off of these matters and try to keep him from them?

A. That is good whether he has nervous trouble or not.

139 Q. It is particularly good in cases of nervous trouble?

A. That would depend again, I would say, upon the nature of the nervous trouble. Some forms of nervous trouble are not affected in the least by means of this kind used, any more than any other form of sickness—such as typhoid fever, or any other form of sickness. They are benefited, maybe a little, the patient is more comfortable.

Q. Isn't it a fact, doctor, if you have patients suffering from nervous trouble, and imagine, for instance, that they can't use their hand or limb, and things of that kind, when there really is no physical reason why it can't be used?

A. That is true, yes.

Q. And if that condition lasts with them for some length of time, the limb or part of the body will get so that they can't use it, until by exercise or use of it the function is brought back?

A. They lose some of the power by non-use; yes.

Q. Doctor, Mr. McAdow is a very well nourished man, isn't he?

A. Very well, yes.

Q. For a man who has had no employment, been engaged in no kind of business or labor for 15 months, and taken little of any exercise, he is a very well nourished man?

A. He is very well nourished, yes, generally speaking.

Q. Did you find over Mr. McAdow's body, in your examination, any bone that had been broken?

A. As I said previously, his condition was so painful that I was unable to manipulate the bones.

Q. Of course you did examine as well as you could?

140 A. As well as I could examine; I didn't find any evidence; no.

Q. You didn't find any evidence of broken bones?

A. But I couldn't make a good examination of those bones.

Q. Did you find any evidence, any external evidence; I am not talking about this nervous evidence, but any external evidence of any injury he had received?

A. No, I didn't find any evidence on the surface of his body—that is scars, or anything of that kind.

Redirect examination by Mr. ATWOOD:

Q. You speak of the difference in a functional trouble and organic nervous trouble—state that again, please. I didn't quite understand what you said about it.

A. Functional trouble means that the condition—that the function, or power to perform the work intended by certain tissues of the body, are lessened, without a change in the anatomical structure.

Q. The function of the muscle is affected?

A. Yes, sir.

Q. There might be such a condition that he couldn't contract the muscle, and yet the organism of the muscle would remain unchanged?

A. Yes, sir.

Q. And if there was a change in the organism, there would be an organic change and then the matter of imagination couldn't control?

A. It would have nothing to do with it.

Q. What about McAdow's condition, in your opinion, as a medical man, speaking in the light of your experience and long study
141 of medicine generally. In his case state whether or not this nerve trouble that you have described, is nervous or otherwise?

Mr. COWHERD: Which do you refer to?

Mr. ATWOOD: The nerve trouble.

A. Just the nerves in the muscles?

Q. Nerves and muscles?

Mr. COWHERD: I object to his confusion and blending the two different propositions in one.

Q. I mean whether they are both organic?

A. Well, the condition as I found it and the symptoms manifested, I should say that Mr. McAdow—that the condition of his nerves is organic—and also of the muscles, is organic, and that he has an inflammatory condition of the nerve fibres and also of the muscle fibres, and the function or employment of his muscles is injured.

Q. And it is, in your opinion, an organic condition?

A. That is certainly an organic condition.

Q. When you find a muscle wasted away, there is a change in the organism of the muscles?

A. It is a organic condition—yes.

Recross-examination by Mr. COWHERD:

Q. Muscular inflammation would very naturally come from nerve inflammation, wouldn't it?

A. No, I said he could have inflammation of the muscles without the nerves being inflamed, and an inflammation of the nerves accompanying an inflammation of the muscles. Or an inflammation of the nerves, called neuritis.

Q. If there was a long standing neuritis it would be nat-
142 ural to have some muscular inflammation there?

A. In that case—no.

Q. Is it neutritis or neuritis?

A. It is neuritis.

Q. And it was neuritis that he was suffering from, was it?

A. Yes, sir.

Q. Now, Doctor, you said you examined Mr. McAdow's heart and lungs and kidneys, &c.—and all his organs are in apparently good condition, are they not?

A. Those organs are, yes, they are in good condition.

Q. They are the vital organs that function life?

A. Yes, sir.

Redirect examination by Mr. ATWOOD:

Q. Speaking of subjective symptoms, this electric current—the current of electricity applied to muscles—that isn't a subjective symptom I take it.

A. It is beyond the power of voluntary control.

Q. And you can't make your muscles waste away, can you?

A. You can't, no.

Recross-examination by Mr. COWHERD:

Q. You don't mean by saying you can't make the muscles waste, that you can't by leaving off using the muscles entirely?

A. Your muscles would decrease some in size.

Q. And there will be some wasting away?

A. Yes, there will be some wasting.

Dr. W. M. JOY, having been duly sworn as a witness for the plaintiff, testified as follows:

Direct examination by Mr. ATWOOD:

Q. Your name is Dr. Joy?

A. Dr. W. M. Joy.

143 Q. With offices both in Kansas City, Kansa. and Kansas City, Missouri?

A. Yes, sir.

Q. You are the same Dr. Joy who treated Mr. McAdow?

A. Yes, sir.

Q. Beginning in January, 1912?

A. January 17th, I believe, is my first call.

Q. Tell the jury the condition in which you found him, and what evidences of injury you found upon him? First I will ask you how long you have practiced medicine, Doctor?

A. Since May, 1907.

Q. Continuously?

A. Yes, sir.

Q. Practicing both in Kansas City, Missouri, and Kansas City, Kansas?

A. Yes, sir.

Q. Now then you examined him on the 17th of January, 1912, and tell the jury what condition you found him in and what evidences of injury you found, if any?

A. Well, I was called at his house first to see him. If I remember right it was along towards evening when I was called.

Mr. COWHERD: Do you remember when?

A. I think it was the 17th of January. I have these dates—I will make that certain (looking)—the 17th of January, 1912. I found him lying on a cot or little bed—in the dining room, probably—propped up with pillows, strapped on the left side—heavily strapped—with adhesive plasters, such as a physician or surgeon uses to hold a broken hip. He was very nervous and complained of sensibility to any noise; complained of some headache; and com-

plained quite a great deal of pain, which seemed to be a fact
144 that he had. On examination I found when I removed the adhesive straps and on examination I found three ribs broken—the 6th and 7th were broken half way around the body—about half way around the spinal column—the 6th and 7th—and the 8th rib was torn loose from its coupling at the place the ligaments are coupled at the spinal column—that is, it showed evidence of having been torn loose—it was very tender—the tissues there were still tender and enlarged.

Q. Were those conditions indicative of a break, to a medical observer?

A. Yes, sir. Then on his back I found all the muscles all the way up and down the back enlarged and very sensitive to the touch; however I could palpate the spinal column and found there was a curvature from the left to the right.

Q. A curvature of the spine?

A. Of the spinal column—where it was forced from the left to the right, so that it made a curve in there that corresponded with these three ribs that were broken. And the muscles of the shoulder were enlarged, and there was a ridge on the right shoulder blade, beginning at the inner lower corner of the shoulder blade and across down—the ridge there showing there had been a crack or break across there. It was very sensitive. He had a temperature at that time of about 101. I don't remember the pulse rate, but of course it would be exaggerated at that time.

Q. Had there developed any symptoms of nerve derangement?

A. Yes, he was very highly sensitive at the time, and very nervous.

Q. Had neuritis set in at that time?

A. Neuritis had set in at that time.

145 Q. Have you been to see him at other times since then?

A. Yes, sir.

Q. You are what is called the family physician?

A. I was his family physician.

Q. How many times, roughly estimating, do you think you have seen him, trying to do anything for him, in that time?

A. Well, there was a number of trips right along for the next four or five days, that I went every day, and then there were several in there when I went just occasionally—I just saw him occasionally because there wasn't much I could do.

Q. One of those things that medicine can't help very much?

A. Yes, sir.

Q. I will ask you, at any time when you examined him did you notice any waste in the muscles of the shoulder?

A. I noticed that more particularly, I think, it was the 8th of December, when I was at his house.

Q. This last December?

A. This last December. And that was the last time I saw him. The superior muscles, over the shoulder blade, were shrunken.

Q. What does that mean to a medical man?

A. It means a continuous progressive atrophy, and finally there might be a paralysis there.

Cross-examination by Judge MOORE:

Q. Where do you reside, Doctor?
A. I reside in Kansas City, Kansas—on 13th between Wood and Virginia.
Q. How long have you resided there?
A. Since 1908.
146 Q. Where is your office?
A. My office at the present time is in Kansas City, Missouri, in the Hall Building.
Q. How long have you had an office in Kansas City, Missouri?
A. About three weeks.
Q. Have you an office on the Kansas side now?
A. I am officing over there.
Q. Where?
A. At my house—13th and Wood.
Q. Have you any other office?
A. That is all.
Q. Did you ever have an office on the Kansas side?
A. Yes, sir.
Q. Where?
A. In the Fasenmyer Building.
Q. When did you vacate it?
A. This last month.
Q. Why?
A. Because I got tired of staying there.
Q. Was that the only reason?
A. Yes, sir.
Q. Isn't it a fact that Mr. Fasenmyer put you out of the building?
A. Not that I know of.

Mr. ATWOOD: I object to this as incompetent, irrelevant and immaterial, assuming for the moment that there was any difference between the tenant and landlord.

Q. Well, he says not. What college are you a graduate of—what medical college?
A. From the Eclectic Medical University.
Q. Where?
A. In Kansas City.
Q. When?
A. 1907.
Q. What is your name?
A. W. Moxey Joy.
Q. When were you licensed to practice in Kansas?
A. The same year, in June.
147 Q. In 1907?
A. Yes, sir.
Q. Are you connected with any hospital?
A. No, sir.
Q. Have you ever been?
A. No, sir.

Q. Who are you officing with now, or are you by yourself?
A. I have a lady physician that offices with me.
Q. What is her name?
A. Phillips.
Q. A physician?
A. Yes, sir.
Q. Did she office with you in Kansas City, Kansas, in the Fasenmyer Building?
A. Yes, sir.
Q. Is she there now?
A. Yes, sir.
Q. In the Fasenmyer Building?
A. No, sir.
Q. She is with you now?
A. Yes, sir.
Q. You say you called on the plaintiff first on the 17th of January, 1912?
A. Yes, sir.
Q. Previous to that you had been his family physician, had you not?
A. Yes, sir.
Q. How long?
A. Possibly two or three years—three years, I believe.
Q. Had you attended him personally, as well as the other members of his family, prior to this time?
A. I don't remember of attending him but once. I believe I attended him once, in a case of grip.
Q. When did you first learn that Mr. McAdow had an accident on the 18th of December, 1911?
A. About eleven o'clock, I think, of that day.
Q. Did you see him that day?
A. No, sir, I did not.
Q. When did you first see him after that?
A. I saw him at his house, on the 17th day of January.
148 Q. Just one month, lacking a day?
A. I didn't count the days of the month—that is the day that I saw him.
Q. In January, 1912?
A. Yes, sir.
Q. And the accident was on December 18th, 1911?
A. Yes, sir.
Q. Were you sent for by him or any member of his family, to see him, after his accident?
A. That is how I happened to go to his house.
Q. I mean prior to the 17th of January?
A. There was a call for me that morning, but I was away.
Q. What morning?
A. The morning he was hurt.
Q. You were not called to him until the 17th of January?
A. No, not until the 17th of January.

Q. You say you found three ribs broken?
A. Yes, sir.
Q. Could you tell from your examination at that time how long they had been broken?
A. The tissues around them were still very tender to touch—it showed they were a recent break.
Q. You also found a curvature of the spine, you say?
A. Yes, sir.
Q. What is the last time you examnied him?
A. The last time I examined him, or went over him at all, was the 18th of December.
Q. Month before last?
A. Yes, sir.
Q. December, 1912?
A. Yes, sir.
Q. Did you find a curvature of the spine then?
A. It was very tender I couldn't touch it then.
149 Q. At that time was it still observable from your examination—his broken ribs?
A. It was tender over the ribs, and a little enlargement on the rib was still present. It wasn't so tender to the touch. There was a little nodule.
Q. Tell the jury what you mean by a little nodule there? Where it knits you mean?
A. Yes, where it is united—there is a little raise there—as a rule there is.
Q. The raise stays there for some time?
A. Yes, sir.
Q. About how long?
A. That is something I don't know—I can't answer exactly how long. It depends on the vitality and condition of the man and how closely they are set together.
Q. Well, a man in the present condition of Mr. McAdow—wouldn't you say that raise was still there now?
A. Yes, sir; probably still there now.
Q. By examination any competent physician or surgeon could tell now whether or not the ribs had been broken?
A. I think so.
Q. And the same would be of that curvature of the spine?
A. If not too tender, so you can't palpate it.
Q. You say you also found the right shoulder blade in a condition that indicated what, to you?
A. Indicated a crack—possibly a break—across the shoulder blade.
Q. What do you call the shoulder blade?
A. The scapula.
Q. Which one, the left or right?
A. The right.
Q. You had no difficulty in making that examination in
150 coming to that conclusion, from your examination, at that time?

A. It is always difficult to come to a conclusion because the muscles over it you have to palpate.

Q. You did come to that conclusion on January 17th, 1912?

A. Yes, sir.

Q. At that time he was suffering from neuritis?

A. Yes, sir.

Q. Your found bandages—he was bandaged at that time by some surgeon?

A. Yes, sir.

Q. Last December, December 12th, you looked and found, I believe, a shrinking of the muscles—was that the first time you noticed that?

A. That was the first time I noticed that—yes.

Q. You didn't observe that in any of your former examinations?

A. No, but it had been some time before that I had examined him.

Q. Between January 17th, 1912, and December, how many times did you examine him?

A. I don't believe I examined him but once between those times, if I remember correctly.

Q. Didn't you call to see him any more after January 17th, 1912?

A. Yes, sir; I called to see him occasionally.

Q. How often?

A. I can't tell you how often.

Q. Was it professionally?

A. Yes, sir; certainly.

Q. And when did you get your license to practice in Missouri?

A. My papers are going through the mill now, and I expect them here next week.

151 Q. I thought you said you had them here?

A. No, sir; I said not—I said I practiced in Kansas—and that gave me the privilege of coming across the line.

Q. You said you had your offices in Kansas City, Missouri.

A. I can't practice here yet. I haven't started up in this city yet.

Q. Why do you have offices, then?

A. Because I am going to practice as soon as the papers are through.

Q. Is this lady in your office with you—is she licensed to practice in Missouri?

A. No, sir.

Mr. ATWOOD: Th-s is objected to—about the lady doctor.

Q. When did you make your application for a license to practice in Missouri?

A. About a month ago.

Q. You haven't heard from it yet?

A. No.

Mr. ATWOOD: At this point application is made by the defendant to the court for an order directing the plaintiff to file certain depositions taken in the City of Leavenworth, Kansas. The agreement between the parties at the time of taking said depositions is shown

to be as follows, on said depositions: "By Mr. Hutchings: I want it distinctly understood that this deposition is taken in shorthand. It is to be written out and transcribed and signed by the witness, and filed in court. I object to the deposition being taken and afterwards pocketed and not filed in court. By Mr. Hill: We will have no understanding about it. Mr. Hutchings: I object to the taking of the deposition in short hand. Mr. Hill: I hereby direct the Notary to transcribe and have signed the deposition being today
152 taken, and filed in this cause." To which application the plaintiff objects for the reason that the deposition was incorrect and that it has not been transcribed under the rules of this court by the Notary who officially took the deposition; and consequently it does not appear that the evidence is authenticated as required for any deposition that is to be used in evidence. Which objection was by the court overruled; and the court thereupon directed and ordered that the plaintiff, if he has the original of said deposition signed by the witness, to file the same with the clerk in this case. To which ruling of the court the plaintiff then and there duly excepted, and thereupon obeyed the order of the court and filed the deposition.

Mr. COWHERD: I want the further understanding that these depositions were sent to you upon your request by the Notary who took them.

Mr. ATWOOD: That is true.

Mr. COWHERD: We want to use the deposition and we have had no opportunity to see it until today. The deposition for the first time was brought here a few minutes ago, and the Notary doesn't seem to have certified it. We want to use the deposition. And if Mr. Atwood is going to object because it isn't certified we want to take it back and have it certified.

Mr. ATWOOD: I will make no objection on the ground that it is not certified.

The plaintiff here rested his case.

Whereupon the defendant demurred to the evidence offered by the plaintiff, and asked the court to give the following instruction:

153 "The court instructs the jury that under the pleadings and evidence in this case your verdict will be for the defendant."

The court overruled the said demurrer to the plaintiff's evidence, and refused to give the said instruction to the jury. To which ruling and action of the court the defendant then and there duly excepted.

Whereupon the defendant, to sustain the issues upon its part, offered and introduced evidence as follows:

Mr. COWHERD: We offer in evidence the deposition of J. W. Richardson, taken before Floyd E. Harper, judge of the City Court of Leavenworth, on the 18th day of October, 1912.

The said deposition is as follows:

Mr. Cowherd reads:

"J. W. RICHARDSON, of lawful age, being produced, sworn and examined on the part of the plaintiff, deposeth and saith:

Direct examination by O. S. HILL:

Q. Your name is J. W. Richardson?
A. J. W. Richardson.
Q. What position do you hold with the Kansas City-Western Railway Company?
A. General superintendent.
Q. What, in a general way, are your duties?
A. Charge of the men. With affairs in general.
Q. Were you acquainted with George B. McAdow?
A. Yes, sir.
154 Q. Was he a motorman in the employ of your company in December, 1911, and prior thereto?
A. Yes, sir.
Q. Do you remember there was an accident or a collision of two cars south of Wolcott, on December 18, 1911
A. Yes, sir.
Q. Do you know if Mr. McAdow was one of the men who was operating one of the cars at that time?
A. Yes, sir, he was.
Q. At the time of the accident, and prior thereto, what constituted his run? How many hours?
A. 12 hours each day.
Q. What time did he start out in the morning?
A. He left Chelsea at 5:30 and got back to Chelsea at 5:30 in the evening.
Q. Did he run in Kansas City, Missouri?
A. Yes, sir. He went to Kansas City, Missouri, and then up here. He was not working for us when he ran in Missouri.
Q. At the time I have mentioned here, what was the schedule between Kansas City, Missouri, and Leavenworth, Kansas? During the 24 hours how many trains did you run on an average?
A. We didn't run any cars on schedule to Kansas City, Missouri. We didn't operate in Missouri.
Q. Your passenger cars did run from your end in Kansas City, Kansas, over to Kansas City, Missouri, on an hourly schedule?
A. Did under the Metropolitan direction.
Q. Now, is it a fact that when a motorman would take
155 his car out in the morning in Kansas City, Kansas, that the dispatcher at Wolcott would give him orders where to make his first run?
A. No, not beyond the connection point at 18th and Central. Not on the Metropolitan tracks.
Q. You knew Mr. Royal?
A. Yes, sir.
Q. He was in the collision that I spoke of. Mr. Royal was killed?
A. Yes, sir.
Q. Don't you know that the first order that he gave on the morn-

ing of the accident was to run his car to Kansas City, Missouri, and back?

A. No; I did not.

Q. He didn't give such order?

A. No, sir. He said to Kansas City.

Q. What did that mean?

A. To Kansas City, Kansas. That's as far as he had authority to direct.

Q. Now, where did your cars start out at Kansas City, Kansas?

A. They start from Chelsea Junction and go to 18th and Central.

Q. Where did they end?

A. 18th and Central.

Q. Now, don't you know that the dispatcher gave orders that meant starting out in Kansas City, Kansas, and go to Kansas City, Missouri, and return?

A. No, sir. Just said Kansas City. Wrote it on the train sheet. This meant Kansas City, Kansas—not Missouri.

Q. Now, do you understand that under that order it meant that it didn't want him to go to Kansas City, Missouri?

A. No. It just meant to go to 18th and Central. There the Metropolitan would take his car.

Q. Who started out at 18th and Central?

A. He left Chelsea for 18th and Central. That's as far as we had authority.

156 Q. Is Chelsea where the barn is?

A. Yes, sir, sub-station.

Q. Now, these orders are given to the conductor and motorman together?

A. Yes, sir.

Q. And you say that the dispatcher never gave them any orders to run their car over into Kansas City, Missouri?

A. No, sir; I can show you the train sheet made by G. V. Royal, the train dispatcher.

Q. Don't you know that at the time that I am asking you about, that the company's cars were ordered to make the loop into Kansas City, Missouri, and back?

A. No, they were not.

Q. I will ask you to explain what were the rules of the company with reference to cars passing different points going opposite directions?

A. Well, the train dispatcher would tell them where to pass.

Q. Were these orders written?

A. The train dispatcher made a written copy of them. Wrote them on the train sheet. You would practically call it a written order. The conductor and motorman would punch stations which would tell them where to meet at.

Q. What were the duties of the conductor and motorman on passing cars with reference to exchanging slips as they passed?

A. When they met, they were to exchange slips with each other.

Q. Then, if the train crew should get an order to meet a car at a

certain station it would meet it at that station and the train slips should be exchanged?

A. Yes, sir.

157 Q. On the morning of this collision, did you know what the train order was, with reference to the car operated by Lowe, going south?

A. Well, the train sheet shows the order Mr. Royal gave.

Q. Do you mean Mr. Royal, or Mr. Huttner?

A. Mr. Royal gave most of the order.

Q. This order you are talking about?

A. Yes.

Q. What part of it did he give?

A. Well, McAdow called C. V. Royal, the train dispatcher, at Grandview. The train sheet shows that after they reported at 18th and Central, G. V. Royal the train dispatcher told them to meet one car at Grandview and report at Bethel.

Q. Well, do you know who gave the order to run to Wolcott?

A. Mr. Huttner gave it.

Q. What did the train sheet show?

A. Showed that Mr. Huttner wrote the order.

Q. Now, what did the train sheet show? Who gave the order to Lowe?

A. Mr. Huttner.

Q. Now, do you know what that order was that he gave Mr. Lowe that morning?

A. Yes. The train sheet shows, "Meet one car at Wolcott; 2 at Chelsea and go to K. C."

Q. Did that mean that the car that Lowe was running should remain at Wolcott until it had exchanged slips with the car that was coming from the south?

A. Yes. It meant that Lowe should not have went off the south end of the switch at Wolcott, until he met the car coming north.

Mr. HUTCHINGS: If you will use the number of the car, it would save cross examination. You should say that car number nine should not have left.

158 Mr. HILL: The car going south was number nine and the car coming north?

A. Number 21.

Mr. HILL: Car number 9 going south should not have gone out of the switch until it met and exchanged slips with the conductor on 21 going north?

A. Yes, sir; it should not have gone out of the switch until No. 21 passed.

Q. Now you frequently ride over this line?

A. Yes, sir.

Q. And, I will ask you, if, on cars passing, you observed that they always exchanged these passing slips, at, and prior to the time of the collision?

A. Yes. Always did whenever I seen them.

Q. Isn't it possible at Wolcott, by the use of the telephone to the

power house, to cut off the power and instantly stop cars on the line?

A. You could in perhaps 8 or 10 minutes. It would take that long.

Q. How do you figure that long?

A. You have to call up Chelsea and you might not get them.

Q. What, if any, conversation did you have on the morning of the accident, with Mr. Huttner?

A. Well, I don't know as I had anything in particular. Just told him to make out his report. That's as far as I remember that I had.

Q. Now, employes of the road such as train dispatchers and conductors and others, were they provided with transportation over the line?

A. The train dispatcher was given a pass to ride to and from
159 home to his work. Conductors or motormen could ride to and from their work and while on duty when they had on their uniform.

Q. Was this pass issued to them a part of the consideration of their employment, or was it just a favor of the company?

A. A part of the consideration of their employment.

* * * * * * *

Q. Was there a written contract between the Metropolitan Street Railway Company and the Kansas City-Western Railway Company, in December, 1911, with reference to the use of the tracks of the Metropolitan by the Kansas City-Western Railroad Company?

A. I never seen the original contract. I suppose there was one, though.

Q. But you don't know whether there was or not?

A. No; never seen the original contract.

Q. Does the Kansas City Western Railway Company maintain any ticket office in Kansas City, Missouri?

A. Not an office. The Owl Drug Store sells tickets for us, there. We don't have any office there.

Q. Who pays them to do this work?

A. We pay the Owl Drug Store.

Q. Do you know how much is paid?

A. $15.00 per month.

Q. How often according to your schedule do the cars of this company pass 10th and Main Street, in Kansas City, Missouri?

A. We had no schedule for the Metropolitan tracks. It operated cars every hour during the day; sometimes every half hour. We had no control of cars on the Metropolitan tracks.

160 Q. Is there considerable traffic between Leavenworth and Kansas City, Missouri, over this line?

A. Well, there is. The cars are always more or less full. We don't keep any account only in Kansas.

* * * * * * *

Q. Now, when the car goes to Kansas City, Missouri, does your motorman run through from Leavenworth to Kansas City, Missouri?

A. The same motorman runs, but strictly under the orders of the Metropolitan, as soon as the cars reach their tracks.

Q. He is paid by your company?

A. No; we advance the money and the Metropolitan pays us back.

Q. But the Metropolitan never pays him anything?

A. No. They pay it to us. We advance it for them to save going over there.

Q. How many hours a day does a motorman work?

A. From 10 to 12.

Q. What was the number of Mr. McAdow's hours?

A. Twelve.

Q. And paid by the hour?

A. Yes, sir.

Q. And his run carried him every day over to Kansas City, Missouri, did it not?

A. Well, he took the car over there. He was the motorman but he could not run on their tracks unless the Metropolitan approved of his running.

Q. He manipulated the car?

A. Yes, sir.

Q. If the trainmen in charge of 21 and in charge of car number 9 had exchanged their passing slips there would have been no collision.

A. If they had exchanged them at the proper place, there would not.

Mr. HILL: That's all.

161 Cross-examination by C. F. HUTCHINGS:

Q. Mr. McAdow performed no service for the Kansas City Western Railway, except in the State of Kansas?

A. No, sir.

Q. He had nothing to do with the operation of freight trains?

A. No, sir.

Q. He was not employed by the Kansas City Western Railway Company to perform any service except in the State of Kansas?

A. No, sir.

Q. And to operate its cars in this state?

A. Yes, sir.

Q. The Kansas City Western Railway Company has not, nor never has had any tracks in Kansas City, Missouri?

A. No, sir.

Q. The Kansas City Western Railway Company has never operated in any form or shape, any car in Kansas City, Missouri?

A. No, sir.

Q. Had any person employed for that purpose?

A. No, sir.

Q. You may state whether the Kansas City Western Railway Company paid Mr. McAdow for any service he rendered in the operation of its car over the Metropolitan Street Railway tracks?

A. They did not.

Q. How far, or about how far, is the terminus of the tracks of the Kansas City Western Railway at 18th and Central Avenue from the Missouri State Line?

A. About two and one-half miles.

Q. Mr. McAdow would operate a car of the Kansas City Western Railway Company to the terminus of its tracks at 18th and Central Avenue?

A. Yes, sir.

162 Q. He would then, under an arrangement with the Metropolitan Street Railway Company, operate that car for about 2 and ½ miles to the State Line and then through Missouri, in Kansas City, Missouri, and back to the terminus of the Kansas City Western tracks?

A. Yes, sir.

Q. For all the time that he expended in operating that car from the terminus of the Kansas City Western tracks, he was paid by the Metropolitan Street Railway Company?

A. Yes, sir.

Q. That payment was a part of the arrangement with the Metropolitan Railway Company, was it not?

A. Yes, sir.

Q. And the payment would be made by the Kansas City Western Railway Company advancing the money and sending a bill to the Metropolitan Street Railway Company, which refunded it?

A. Yes, sir.

Q. During the time that Mr. McAdow was engaged in operating a Kansas City Western car over the tracks of the Metropolitan Street Railway Company, in Kansas and Missouri, state whether the Kansas City Western Railway Company had or exercised or claimed the right to exercise any control over him?

A. It did not.

Q. You may state whether while so operating on the Metropolitan Street Railway Company's tracks, Mr. McAdow was subject entirely to the orders of the Metropolitan Street Railway?

A. He was.

163 Q. You may state whether, if any accident or injuries occurred by reason of the operation of a Kansas City Western car over the Metropolitan Street Railway tracks, the Metropolitan Company was to pay such damages?

A. They were.

Q. Now, after a car of the Kansas City Western Railway Company reached the termination of its tracks at 18th and Central Avenue, and was taken onto the Metropolitan tracks, you may state whether any fares were collected on account of any passengers riding in said car, by the Kansas City Western Railway Company?

A. There was not.

Q. You may state what compensation, if any, the Metropolitan Street Railway Company paid the Kansas City Western Railway Company, for the use of its car from the terminus of the Kansas City Western tracks through Kansas City, Missouri, and back?

A. They paid one cent per passenger for cash fares on our car.

Q. Now, you may state whether, while that car was being operated in Kansas City, Missouri, the Kansas City Western Railway Company received any fares for any passengers that rode on the car?

A. They did not.

Q. It was only such passengers as were in the car at the time it was delivered to the Metropolitan Street Railway Company, that any compensation was paid to the Kansas City Western Railway?

A. Yes, sir, it was.

Q. All passengers that entered that car after it got on the Metropolitan Street Railway tracks—their fares were collected and the sole property of the Metropolitan Street Railway Company?

A. Yes, sir.

Q. No part of those fares were ever paid to the Kansas City Western Railway Company?

A. None at all.

164 Q. Now, you may state whether, after the Metropolitan Street Railway Company receives a car of the Kansas City Western Railway Company on its tracks, you know whether the Metropolitan gave transfers to all parts of its line?

A. Anyone paying cash fares it does.

Q. So that a Kansas City Western car after it enters on the tracks of the Metropolitan, is used as the Metropolitan's own car?

A. Yes, sir.

Q. It collects fares for all passengers that get on the cars on its line and gives all such passengers who pay cash fare, a transfer to all parts of its line in Kansas City, Missouri, or Kansas City, Kansas?

A. Yes, sir.

Q. Now, you have stated that all employes of the company who wear a uniform are permitted to ride free while in their uniform?

A. Yes, sir. To and from work.

* * * * * * *

Q. How large are those vestibules?

A. On 21, 22, 23, and 24, they are about 7½ feet wide by 18 inches to 2½ feet deep. 2½ feet deep in the center and 18 inches at the end. Then the other cars about 7½ feet wide and possibly 3 feet deep.

* * * * * * *

Q. You have been asked whether the Company had a ticket office in Kansas City, Missouri. You may state whether those ticket agents sold any tickets except for passage on lines of the company in Kansas?

A. That was all.

165 Q. You may state whether those agents sold any tickets for rides over the lines of the Metropolitan Street Railway Company, or any of them?

A. They did not.

Q. The tickets sold by these agents were from Kansas City, Kansas, to some point in Kansas?

A. They read that way. Yes.

Q. Now, with reference to the operation of cars, you may state

whether the motorman has any authority to start a car without a signal from the conductor?

A. The order is to never start a car without a signal from the conductor.

* * * * * * *

Redirect examination by O. S. HILL.

Mr. Hill reads:

"Q. And, these dispatchers handle reight billed from Kansas City, Missouri, to Leavenworth and from Leavenworth to Kansas City, Missouri?

A. Yes, sir.

Q. Now, when these freight trains got off of your line were they under the orders of the Kansas City Western or the Metropolitan orders?

A. They never got off our line.

Q. Now, this freight was billed through from Kansas City, Missouri, to Leavenworth?

A. Yes, sir. And it was carried from Kansas City, Kansas, to Leavenworth on a freight car; from Leavenworth to Kansas City, Kansas, and there it was put on a wagon and taken over to 6th and Penn.

Q. But the railroad, your road, contracted to carry the freight from Leavenworth to Kansas City, Missouri, or the reverse?

A. We issued the bill of lading from Leavenworth to Missouri.

166 Q. Does your company make reports to the Interstate Commerce Commission?

Mr. HUTCHINGS: I object to the question as secondary evidence and not the best evidence.

A. Do we?

Q. Yes.

A. Well, if there is any one killed we telegraph them.

Q. Why did you do that?

A. We were advised to.

Q. By whom?

A. Our counsel.

Q. Did you make a written report to them?

A. Yes, we make a written report each month of any injuries or any accident.

Q. In addition to these reports do you make an annual report?

A. Yes. Just a summary of these monthly reports.

Q. And you were doing that in December, 1911?

A. Yes, sir.

Q. And you say Mr. McAdow was to work 12 hours a day?

A. Yes, sir. I think about that.

Q. And was paid by the hour by your company?

A. Well, we advanced the money——

Q. Just a minute—I am asking if you paid Mr. McAdow?

Mr. HUTCHINGS: I object to the question as calling for the con-

clusion of the witness as it has been stated that the money was advanced by the company for the Metropolitan.

Q. Did the Metropolitan pay, direct, Mr. McAdow any money?
A. No, they paid us.
167 Q. Not to him?
A. No.

Q. How often did you pay your employes prior to December, 1911?
A. Twice a month.
Q. Twice a month?
A. Yes, sir.
Q. How did you pay them?
A. By check.
Q. And, what did you pay Mr. McAdow?
A. What do you mean? According to the hours he put in?
Q. According to the number of hours—yes?
A. We paid him our share and advanced the other share.
Q. But included in this check that you gave Mr. McAdow would be the time he put in over in Missouri?
A. Yes, we advanced him their part.
Q. Mr. McAdow was never given any check or pay direct by the Metropolitan?
A. Not that I know of.
Q. Now, Mr. Richardson, as I understand you, the amount got out of the five cents collected by the Metropolitan for passengers delivered to them by your company, your company received one cent per passenger?
A. One cent per passenger for the use of our car; that is passengers we delivered to them.

* * * * * * *

Q. Do you know what Mr. McAdow's orders were on the morning of this collision?
A. Well, I told you in the beginning that the train sheet shows that when he reported at Grandview, G. V. Royal gave him orders to meet one car at Grandview and report at Bethel; then he reported at Bethel and Huttner gave orders to go to Wolcott. The train sheet shows Huttner's writing.
Q. Now at the time Mr. McAdow was hurt, he was running
168 by the orders given by the dispatcher.
A. Yes, I think he was.

Mr. HILL: That's all."

Mr. Cowherd reads:

"Mr. HUTCHINGS: Mr. McAdow was not employed by the Kansas City Western Railway Company to perform and never did perform any service for it, except in the State of Kansas?
A. No, sir.

* * * * * * *

(Signed) J. W. RICHARDSON."

C. F. COLE, having been duly sworn as a witness for the defendant, testified as follows:

Direct examination by Judge MOORE:

Q. State your name to the jury?
A. C. F. Cole.
Q. Where do you live?
A. Kansas City, Missouri.
Q. How long have you lived here?
A. Five or six years.
Q. What is your occupation?
A. Auditor.
Q. Of what?
A. Metropolitan Street Railway.
Q. How long have you been Auditor of the Metropolitan Street Railway?
A. Nearly four years.
Q. Are you acquainted with S. M. James—or Sol James, as he is commonly called?
A. Yes, sir.
Q. On January 10th, 1911, I will ask you to state whether or not Mr. James was assistant general superintendent of the Metropolitan Street Railway Company?
A. He was—yes, sir.
169 Q. I will ask you whether you are acquainted with his signature?
A. I am.
Q. State whether or not that is his signature there (pointing)?
A. Yes, sir.

Judge MOORE: We will offer this in evidence.
The same was marked "3," and is as follows:

"Metropolitan Street Railway Company.

Official Correspondence.

Date Jan. 10th, 1911.

Department General Supt.

Subject—Disabled Leavenworth Cars.

To All Operating Officials and Trainmen:

When a car of the Kansas City Western Railway Co. (Leavenworth Line) becomes disabled on our tracks, remember that this car must be kept on tracks which will permit of their successful operation—that is, those that are made to accommodate wheels, etc., of these cars. If car is disabled west of Fifth and Wyandotte, place same on dead track at Second and Wyandotte, if disabled between Fifth and Wyandotte and Tenth and Main, place on switch track

at Ninth and Main, or take on around loop and proceed to dead track at Second and Wyandotte. This will avoid much of the trouble we have experienced in the past.

S. M. JAMES,
Asst. Gen. Supt.

Approved:
J. E. GIBSON,
General Supt."

170 Cross-examination by Mr. ATWOOD:

Q. Where is Sol?
A. I don't know. I haven't seen him since this morning.
Q. He is in town, isn't he?

Judge MOORE: There is a subpœna out for him—we couldn't find him.

Q. He was in town this morning?
A. Yes, sir.

Mr. ATWOOD: We object to this Exhibit "3" as incompetent, irrelevant, and hearsay, and not the best evidence of anything.

Judge MOORE: This is an original document, signed by the General Superintendent of the Metropolitan Street Railway as to Leavenworth cars on the Metropolitan tracks, issued by the Metropolitan.

Mr. ATWOOD: We object to it. Sol James is in town and could be produced here, and as to this plaintiff it is hearsay in any event. Let Sol James come and tell about it, if it is competent at all.

Judge MOORE: He could only testify as to the signature, and the auditor has testified to that.

The objection was by the court overruled.

Q. What knowledge have you as to the disposition of the nickle fare collected on the Kansas City Western cars by the Metropolitan conductor—what proportion goes to that company and what portion to the other company?

Judge MOORE: Objected to as not proper cross examination.

The objection was by the court overruled. To which ruling of the court the defendant then and there duly excepted.

171 A. I know what we are paying them at the present time is twenty per cent of the fares for passengers that are on their cars when they are delivered to the Metropolitan lines—whether they are deliver-d into Kansas City, Missouri, or Kansas City, Kansas, or anywhere else.

Q. If those passengers came in at 10th and Main, you collect a nickle and give one cent or twenty per cent, and keep eighty per cent?

A. Yes, sir.

Q. And passengers that get on at 10th and Main, destined for some point in Kansas, and your conductor collects a nickle, and of that nickle twenty per cent goes to the Kansas City Western and eighty per cent is kept by your company?

A. No, sir.
Q. You keep the whole of that, do you?
A. Under certain conditions.
Q. I am not a stockholder in either of them, but I would like to know whether any of the nickles that are collected by your company from a passenger getting on a car at 10th and Main to go out of town into Kansas—whether any part of that nickle is given to them as the others are?
A. Not unless the passenger is on the car when it reaches the Leavenworth line.
Q. That is, if I should get on the car at 10th and Main to go to Leavenworth, Kansas, your conductor would collect a nickle from me, if I had it—or put me off if I didn't—and then if I proceeded or continued to the point where it went upon the tracks that are actually owned by the Kansas City Western, and I w[illegible] on to Leavenworth, such a nickle paid under such circumstances
172 would be divided, the Kansas City Western receiving twenty per cent, and the receivers of the Metropolitan receiving eighty per cent. Is that right?
A. Yes, sir.
Q. And that was the situation in December, 1911?
A. Yes, sir.

Mr. ATWOOD: The receivers were appointed in June, 1911.

Redirect examination by Judge MOORE:

Q. Supposing that the general manager, Richardson of the Kansas City Western Railway would get on at 10th and Main, a Leavenworth car on the Metropolitan tracks, coming over to Kansas City, Kansas—would he not have to pay his fare of five cents, and wouldn't the Metropolitan Street Railway Company get every cent of that nickle?
A. I would say he would—yes, sir.
Q. Or any other employe of the Kansas City Western?
A. Well, now, I wouldn't like to say—so far as I know—I don't know what they do.
Q. Supposing that Mr. Hill should go down here and get on at 10th and Main, and go over to Kansas City, Kansas, on a Leavenworth car running over the Metropolitan tracks, he would pay a nickle?
A. Yes, sir.
Q. Just the same as getting on a Metropolitan car?
A. Yes, sir.
Q. And the Kansas City Western would get no part of that nickle?
A. Not unless he was on the car when it reaches the Leavenworth line.
Q. Not going to the Leavenworth line but getting off be-
173 fore it reaches the Leavenworth line?
A. Yes, sir.

Mr. HILL: If I staid on and went on to Leavenworth, you would get four-fifths and the Leavenworth line one-fifth?
A. Yes, sir.

Recross-examination by Mr. ATWOOD:

Q. As an auditor can you tell whether or not if a man did get on at 10th and Main, in Kansas City, Mo., and paid his nickle, and ran on to Leavenworth, Kansas, that nickle was divided between the Metropolitan and the Kansas City Western, the Kansas City Western getting twenty per cent and the Metropolitan eighty per cent—that both companies were participating in the earnings on interstate traffic?

Judge MOORE: Objected to as calling for a conclusion, and as immaterial.

The objection was by the court overruled, to which ruling of the court the defendant then and there duly excepted.

A. I can only state it would be divided on the returns made by the conductor.

The further hearing of this cause was here adjourned until tomorrow morning, February 5th, 1913.

On February 5th, 1913, pursuant to adjournment, the further hearing of this cause was proceeded with as follows:

174 C. F. COLE, recalled as a witness for the defendant, testified as follows:

Direct examination by Mr. COWHERD:

Q. You testified yesterday that you were auditor of the Metropolitan Street Railway Company?

A. Yes, sir.

Q. And were such auditor prior to the appointment of the receivers and are still acting in that capacity?

A. Yes, sir.

Q. In making a search for the contracts that were called for, between the Metropolitan Street Railway Company and the Kansas City Western Railway Company, did you find this signed copy of the contract amongst your papers (showing)?

A. No, I did not.

Q. Did you find them at the Metropolitan offices?

A. Yes, sir.

Q. Who has the original?

A. This is an original.

Q. I hand you a paper marked "Traffic Agreement with Kansas City Leavenworth Railroad Company," dated July 16th, 1904, and ask you if that is the agreement found in the offices of the Metropolitan Street Railway Company?

A. It is—yes.

Q. In whose possession was this?

A. I believe it was in the legal department's—I am not sure.

Mr. COWHERD: We offer this in evidence.

The same was marked "4," and is as follows:

"Whereas, the Metropolitan Street Railway Company, a corporation duly organized and owning and operating a system of
175 electric street railways in Kansas City, Missouri, and Kansas City, Kansas, and hereinafter called the "Metropolitan Company" and party of the first part; and

Whereas, the Kansas City Elevated Railway Company and the Central Electric Railway Company, corporations duly organized and owning and operating lines of street railway in Kansas City, Missouri, and Kansas City, Kansas, the same being operated in connection with the lines of road of the "Metropolitan Company" and hereinafter referred to as parties of the second part; and

Whereas, the Kansas City-Leavenworth Railroad Company, a corporation duly organized and owning and operating an electric railway extending from Leavenworth, Kansas, to, into and along certain streets in Kansas City, Kansas, and hereinafter called the "Leavenworth Company," and party of the third part; and

Whereas, the "Leavenworth Company" operates what is known as a suburban electric railway, and the "Metropolitan Company" and the parties of the second part operate what is known as "City Street Railways," and

Whereas, the railway of the "Leavenworth Company" intersects the railway of the "Metropolitan Company" and parties of the second part, at Grandview, Kansas City, Kansas; and

Whereas, the parties hereto deem it to be to the mutual advantage that the suburban cars of the "Leavenworth Company" shall be taken, moved and transported over the tracks of the parties
176 of the second part, and also the tracks of the "Metropolitan Company" from point of present intersection in Kansas City, Kansas, as herein agreed:

Now, therefore, this agreement witnesseth:

That for and in consideration of the premises, and of the sums hereafter to be paid as provided herein, and the mutual covenants to be kept by each party hereto, it is mutually agreed between said parties as follows:

1st. The "Metropolitan Company" and the parties of the second part agree to receive, or cause to be received, the cars of the "Leavenworth Company" at Grandview where said railways now intersect in Kansas City, Kansas, and said "Metropolitan Company" and parties of the second part agree that having received, or caused to be received the cars of the "Leavenworth Company" at said point, to move, transport, or cause to be moved or transported the same for passengers, mail, express matter, or other freight therein contained, over, through, or upon the routes of street railways belonging to said "Metropolitan Company" or parties of the second part as follows:

The cars of the "Leavenworth Company" shall be taken at Grandview, thence along Central Avenue to Riverview; thence over the Elevated Road, as soon as same is reinforced to the Eighth Street tunnel; thence through the tunnel to Broadway; thence along Eighth Street to Wyandotte Street; South on Wyandotte Street to
177 Tenth Street; East on Tenth Street to Main; North on Main to Ninth Street; West on Ninth Street to Wyandotte; North

on Wyandotte Street to Eighth, and return over the above described route.

It being understood and agreed that the mail, express matter and other freight contained in the cars of said "Leavenworth Company" shall be limited to such character of traffic as the "Metropolitan Company" and the parties of the second part have under their present franchise a legal right to carry over their said tracks.

2nd. The "Leavenworth Company" will immediately connect its railway with that of the "Metropolitan Company," or the parties of the second part at such point of intersection, such connections to be put in and properly maintained at the sole expense of the "Leavenworth Company." Such connections shall be made so as to interfere as little as possible with the operation of either of the roads to be connected.

3rd. At said point of connection so herein to be provided, for the "Leavenworth Company" agrees to deliver its cars to the "Metropolitan Company," or parties of the second part, to be transported over the route herein designated to the business center of Kansas City, Missouri. Said cars of the "Leavenworth Company" to be substantially in good order and in safe condition, and not injurious to the tracks over which the same are to be run, and such cars as may, under the said franchise be used on the tracks over which they are to run and such as are capable of conforming to the time schedule of the company or companies operating the same.

178 4th. Said "Metropolitan Company" and the said parties of the second part agree to take and operate all cars which may be furnished to it at said point of intersection by said "Leavenworth Company," and assume and pay all expenses of operating such car or cars of the "Leavenworth Company" over, through, or upon any of the tracks belonging to said "Metropolitan Company" or said parties of the second part. In case, however, any unusual number of cars is to be delivered by said "Leavenworth Company," reasonable notice shall be given to the other party or parties, so that the latter may provide employes to receive and operate same.

5th. The "Metropolitan Company" and the parties of the second part agree to operate said cars of the "Leavenworth Company" over the route designated, as speedily and with as much dispatch as its own cars over said tracks, and in case the route herein designated shall be interrupted by any cause, during the period of interruption, said parties agree to move and transport, or cause to be moved and transported, the cars of the "Leavenworth Company" over such other of its available tracks as near as practicable to the route designated herein as may be convenient and feasible to use.

6th. In the event of damage occurring to persons or property in the operation of the cars of the "Leavenworth Company" over the tracks of the "Metropolitan Company," and the parties of the second part, said "Metropolitan Company" and the parties of the second part shall be liable therefor; that is, for any negligence on the part of the "Metropolitan Company," its agents or servants, in the running of said cars, and for any damage that arises from negligence on the part of the "Leavenworth Com-

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pany" the "Leavenworth Company" shall be liable, and in the event the "Metropolitan Company" shall be required to pay any damages on account of the negligence of the "Leavenworth Company" then the "Leavenworth Company" will re-pay to the "Metropolitan Company" all sums of money paid by them on account of the negligence by the "Leavenworth Company."

7th. The "Metropolitan Company" and the parties of the second part agree to pay to said "Leavenworth Company" twenty (20%) per cent of all fares collected by said "Metropolitan Company," or parties of the second part from passengers in cars on said "Leavenworth Company" when said cars are turned over to the "Metropolitan Company," and shall further pay to the "Leavenworth Company" twenty (20%) per cent of all fares collected from passengers in the cars of the "Leavenworth Company" when the car is returned to the "Leavenworth Company," and all passengers so paying said fare in any car of the "Leavenworth Company" shall be entitled to the transfer privileges of said "Metropolitan Company," and the parties of the second part. A weekly statement shall be rendered by said "Metropolitan Company," and the parties of the second part, of all fares so collected, and on or before the 15th day of each calendar month, said "Metropolitan Company," and parties of the second part shall pay to said "Leavenworth Company" its proportion of said fares so collected for the preceding month.

180 8th. Passengers so desiring or those holding transfers issued by the "Metropolitan Company," or parties of the second part, shall be entitled to ride on cars of the "Leavenworth Company," while being operated over and upon the tracks of the "Metropolitan Company" or that of the second parties, except when all of the seats in said cars are occupied with suburban passengers, then no persons except a suburban passenger shall be allowed to take passage on said cars.

9th. For all mail, package, express or other freight carried in the cars of the "Leavenworth Company" over the tracks of the "Metropolitan Company," and the parties of the second part, the "Leavenworth Company" agrees to pay to the "Metropolitan Company" such proportion of all sums which it receives for transporting such mail, package, express or freight as is carried into, through or out of Kansas City, Missouri, or Kansas City, Kansas, as the distance which same is hauled over said tracks of the "Metropolitan Company" bears to the whole distance which said mail, package, express or freight is transported. The "Leavenworth Company" shall cause to be kept way-bills, vouchers and accounts, correctly giving the amount received by it for all mail, package, express or freight carried into Kansas City, Missouri, or Kansas City, Kansas, which said way-bills, vouchers and accounts said "Metropolitan Company" shall have the right to examine and inspect. Said "Metropolitan Company," and parties of the second part shall likewise pay to the "Leavenworth Company" its proportion of all charges on all

181 moneys which it may collect for mail, package, express or freight, which is carried out of Kansas City, Missouri, or Kansas City, Kansas, over the tracks of said "Metropolitan Com-

pany" or parties of the second part in care of said "Leavenworth Company." Monthly statements and settlements shall be made of said above collections.

10th. The "Leavenworth Company" at its own expense shall provide switching facilities, and all the necessary labor for loading, unloading and delivering of all freight, package, express and mail matter, such switch or switches to be connected with the tracks over which the "Leavenworth Company's" cars are run in such a manner that the switching or setting out of the freight, package, express or mail cars will not interfere with or delay the passenger traffic on the line. All such switches and connections with the tracks of the "Metropolitan Company" shall be constructed in a manner satisfactory to the "Metropolitan Company."

11th. It Is Mutually Agreed between all the parties hereto that in case the route described herein proves impracticable or unsatisfactory that the same may be changed with the consent of all the parties to this contract.

12th. As a substantial portion of the consideration for the rights obtained under this contract, the "Leavenworth Company" for itself, or any other company with which it may hereafter have traffic arrangements or in which, or in the property of which it may have or acquire any interest, either directly or indirectly, hereby ex-
182 pressly waives any right during the life of this contract to use under any circumstances or conditions, by reason of anything in any franchise now existing, except by future written agreement, any other tracks of the "Metropolitan Company" the Kansas City Elevated Railway Company, or the Central Electric Railway Company, except those provided herein.

13th. And the "Leavenworth Company," as a substantial portion of the consideration for the rights obtained by this contract hereby, for itself or for any company in which, or in any of the securities of which, or in the property of which it may have or acquire any interest directly or indirectly, further agrees that the said "Leavenworth Company," or any of its successors or assigns, or any such other company, or any one on its behalf, or in the interest of it or them, shall at any time hereafter be granted any municipal franchise or other grant or authority or acquire any right of any nature whatsoever, to operate any street railway upon, across or under any of the streets, alleys or public places within the then limits of Kansas City, Missouri, or Kansas City, Kansas, it will at the election of the "Metropolitan Company" its successors or assigns, on such election being made, immediately without other notice either (1) assign and transfer said franchise, or other municipal grant, or any such other rights to said "Metropolitan Company" or its assigns or to such corporation as it may direct, without charge or compensation, or (2) all the rights hereby granted to the "Leavenworth Company" and all
the duties and obligations of the "Metropolitan Company"
183 hereunder shall at once cease and terminate, and this contract shall be held to be abrogated by said "Leavenworth Company." The provisions of this paragraph shall not apply, however, to the extension or renewal or operation of any franchise or grant

now possessed by the "Leavenworth Company" in Kansas City, Kansas.

And the "Metropolitan Company," on its part as a substantial consideration for this contract, hereby for itself, or for any company in which, or in any of the securities of which, or in the property of which it may have or acquire any interest directly or indirectly, further agrees that if the said "Metropolitan Company" or the second party, or any of its or their successors or assigns, or any such other company, or any one for or on behalf, or in the interest of it or them, shall at any time hereafter be granted any rights, charter privileges or acquire any rights of any nature to construct or operate a suburban electric railway between Kansas City, Missouri, or Kansas City, Kansas, and Leavenworth, Kansas, it will at the election of the "Leavenworth Company" its successors or assigns on such election being made immediately without other notice, assign all the rights so obtained, to build or operate said road between Kansas City, Missouri, and Kansas City, Kansas, and Leavenworth, Kansas, to the "Leavenworth Company" or to such corporation as it may direct without charge or compensation, and on its failure so to do, the "Leavenworth Company" shall be released from all obligations under this contract, and the contract be held to be abrogated by the "Metropolitan Company" or parties of the second part.

184 14th. If the parties hereto, or any of them at any time, do not agree as to the proper construction of any provision of this agreement, or as to any right, duty or liability hereunder, or as to any matter not covered therein, which may arise hereafter, and concerning the carrying out of this contract, such question and all other matters shall be submitted to arbitration, and determined by three arbitrators to be selected as follows; each party shall select one and the two so selected shall, if they can agree, choose a third. If they cannot agree, the third shall be appointed by any judge of the United States District or Circuit Court of Kansas City, Missouri, after notice to the other parties. The arbitrators' award shall be in writing, a copy delivered to each party, and the finding of any two shall be binding upon the parties. No evidence shall be furnished or given any arbitrator until and except at the hearing.

15th. It Is Mutually Agreed by the parties hereto that if in the practical operation of the lines of railway of the various parties hereto, it becomes evident that the cars of the "Leavenworth Company" can be operated more safely and expeditiously, and thus more perfectly serve their patrons, by changing the point of connection from that herein provided for, then and in that case another point of connection shall be selected and the cars of the "Leavenworth Company" operated therefrom over the tracks of the "Metropolitan Company" and parties of the second part, without, however, varying or modifying the other terms of this contract."

185 In view of the necessity on the part of the "Leavenworth Company" making as quick time as possible between the cities of Leavenworth, Kansas, and Kansas City, Missouri, using the tracks of the "Metropolitan Company" as herein provided for, it is further agreed that in case the "Metropolitan Company" or parties

of the second part, acquire the right to operate their cars over a new elevated structure or viaduct which is a more direct route from Kansas City, Kansas, to the retail district of Kansas City, Missouri, the cars of the "Leavenworth Company" may be operated over said last named route, subject, however, to the terms of this contract in all other respects, but provided that change of routing can be made without additional cost to the "Metropolitan Company."

16th. This contract shall run with the property, continue in force and inure to the benefit of, and be binding on the parties hereto, and their respective successors and assigns. All claims arising hereunder shall be a direct charge upon the property of the other, so that in case of foreclosure it shall be adjudged an operating expense prior and preferential to any mortgage sought to be foreclosed.

In Witness Whereof, the various parties hereto set their respective hands and seals by the president and secretary of each of said parties, said officers being hereunto duly authorized, this 16 day of
186 July, in the year of our Lord one thousand nine hundred and four (1904).

METROPOLITAN STREET RY. CO.,
(Signed) By BERNARD CORRIGAN, *President.*
(Signed) W. E. KIRKPATRICK, *Secretary.*
CENTRAL ELECTRIC RY. CO.,
(Signed) By BERNARD CORRIGAN, *President.*
(Signed) W. E. KIRKPATRICK, *Secretary.*
KANSAS CITY ELEVATED RY. CO.,
(Signed) By BERNARD CORRIGAN, *President.*
(Signed) W. E. KIRKPATRICK, *Secretary.*
THE KANSAS CITY-LEAVENWORTH R. R. CO.,
(Signed) By D. H. KIMBERLY, *President.*
(Signed) CHAS. O. EVARTS, *Secretary.*"

Q. Mr. Corrigan was president of the Metropolitan Street Railway Company, was he?
A. Yes, sir.
Q. Do you know his signature?
A. Yes, sir.
Q. Is this his signature, to that contract?
A. Yes, sir.

Mr. ATWOOD: That is a contract between the Metropolitan and the Kansas City Western?
A. Yes, sir.

Mr. ATWOOD: We object to it as not germane to this case, because the Metropolitan isn't a party to this suit, and the receivers of the Metropolitan are not paries to this suit. Consequently as to the plaintiff in this matter, this contract is hearsay, incompetent, irrelevant and immaterial. I don't care much about it, but I don't care to encumber the record with immaterial stuff.

The objection was by the court overruled.

Q. Mr. Cole, I now show you a paper marked Book 4, No.
187 885, Traffic Agreement with the K. C. W. Ry. Co., dated June 27th, 1907—and ask you what that paper is?

A. This is a contract similar to the other and to a certain extent amending the other.

Q. It is a supplemental agreement that was made?

A. Yes, sir.

Q. This, likewise, was in the custody of the Metropolitan Street Railway Company or of the receivers?

A. Well, it was in the custody of the Metropolitan—I couldn't say as to the receivers.

Q. Where did you get it from to-day?

A. I got it from the legal department.

Q. Who are representing the receivers?

A. Yes, sir.

Q. And this bears Mr. Corrigan's signature?

A. Yes, sir.

Mr. COWHERD: I offer this in evidence.

The same was marked "5" and is as follows:

"Modification of the Traffic Contract Between The Metropolitan Street Railway Company, The Kansas City Elevated Railway Company, The Central Electric Railway Company, and The Kansas City Leavenworth Railroad Company.

This Agreement, Witnesseth:

Whereas, on the 16th day of July, 1904, a certain traffic contract was entered into between The Kansas City Leavenworth Railroad Company (the name of which said company has since been changed to The Kansas City-Western Railway Company), hereinafter
188 called the "Leavenworth Company," party of the first part, and The Metropolitan Street Railway Company, hereinafter called the "Metropolitan Company," and The Kansas City Elevated Railway Company and The Central Electric Railway Company, hereinafter called the parties of the second part; whereby it was agreed that the suburban cars of the Leavenworth Company should be taken, moved and transported by a certain route along and over the tracks of said other companies, and pursuant to the terms of said contract, the cars of the Leavenworth Company have been so taken, moved and transported over the tracks of said other companies to the present time; and

Whereas, there has lately been constructed by The Kansas City Viaduct & Terminal Railway Company a viaduct from the intersection of Fourth Street and Minnesota Avenue in Kansas City, Kansas, to the intersection of Sixth and Bluff Streets in Kansas City, Missouri, with railroad tracks thereon, and the Metropolitan Company has acquired the right to operate its cars along and over the tracks on said viaduct, and the Metropolitan Company is now operating its cars over the same; and,

Whereas, the route from Kansas City, Kansas, to Kansas City, Missouri, by the way of said viaduct and the tracks of the Metropolitan Company connecting therewith in Kansas City, Missouri, is more

direct than the route from Grandview over which the cars of the Leavenworth Company are now operated under the terms of
189 said traffic contract, and the Leavenworth Company desires to have its cars operated by such more direct route.

It is Therefore Hereby Agreed between the parties hereto, that said traffic contract shall be modified in the following particulars, to-wit:

1. That the Metropolitan Company as soon as practicable shall construct at the intersection of its tracks on Fifth Street with its tracks on Wyandotte Street in Kansas City, Missouri, such curve, tracks and special works as may be necessary to enable the cars of the Leavenworth Company to be turned from said tracks on Fifth Street to said tracks on Wyandotte Street, and from said tracks on Wyandotte Street to said tracks on Fifth Street, and as soon as such special work shall be completed, the Leavenworth Company shall pay the Metropolitan Company one-half (½) of the cost thereof upon the presentation of an account and statement showing such cost.

2. That as soon as the special work described in the next preceding paragraph of this agreement shall be completed, the Leavenworth Company shall deliver, and the Metropolitan Company shall receive, the cars of the Leavenworth Company where its tracks meet the tracks of the Kansas City Viaduct & Terminal Railway Company at the intersection of Fourth Street and Minnesota Avenue, in Kansas City, Kansas; and the Metropolitan Company having received such cars at said place, shall move and transport the same thence across said viaduct and along the tracks thereon to the intersection of said tracks with the tracks of the Metropolitan Company on Bluff Street
190 in Kansas City, Missouri, thence over and along the tracks of the Metropolitan Company along Bluff Street and Fifth Street to Wyandotte Street, thence over and along its tracks on Wyandotte Street to Tenth Street, thence over and along its tracks on Tenth Street to Main Street, thence over and along its tracks on Main Street to Ninth Street, thence over and along its tracks on Ninth Street to Wyandotte Street, thence over and along its tracks on Wyandotte Street to Fifth Street, thence over and along its tracks on Fifth Street and Bluff Street to the intersection of the tracks of the Kansas City Viaduct & Terminal Railway Company, thence over and along the tracks of the Kansas City Viaduct & Terminal Railway Company across its viaduct to the place where said tracks meet the tracks of the Leavenworth Company at the intersection of Fourth Street and Minnesota Avenue in Kansas City, Kansas, and the Metropolitan Company shall there re-deliver such cars to the Leavenworth Company.

3. That the Leavenworth Company shall assume and pay all the costs of trainmen's wages while they are engaged in operating its cars over the tracks of the Metropolitan Company, but such trainmen, while so operating the cars of the Leavenworth Company over the tracks of the Metropolitan Company, shall be under the exclusive jurisdiction, orders and control of the Metropolitan Company, and as between said companies, shall in all respects be regarded for the time being as the employees of the Metropolitan Company.

191 4. That the Metropolitan Company will pay to the Kansas City Viaduct & Terminal Railway Company the charge of one (1) cent for each passenger conveyed across its viaduct in the cars of the Leavenworth Company, that being the compensation for the privilege of operating its cars across said viaduct.

5. That the Metropolitan Company agrees to pay to the Leavenworth Company twenty (20) per cent of all fares collected by the Metropolitan Company from passengers in cars of the Leavenworth Company when said cars are turned over to the Metropolitan Company and shall further pay to the Leavenworth Company twenty (20) per cent of all fares collected from passengers in the cars of the Leavenworth Company when the same are returned to the Leavenworth Company, and all passengers so paying said fare in any car of the Leavenworth Company shall be entitled to the transfer privileges of the Metropolitan Company. A weekly statement shall be rendered by the Metropolitan Company of all fares so collected, and on or before the 15th day of each calendar month, the Metropolitan Company shall pay to the Leavenworth Company its proportion of said fares so collected for the preceding month.

And it is Further Expressly Agreed between the parties, that all of the terms, conditions, stipulations and covenants contained in said original traffic contract not expressly changed or modified by this agreement shall remain in full force and effect.

In Testimony Whereof, the parties hereto have respect-
192 ively caused this instrument to be signed, executed and delivered by their respective officers thereunto duly authorized, this 27th day of June, 1907.

METROPOLIAN STREET RY. CO.,
(Signed) By BERNARD CORRIGAN, *President.*
(Signed) W. E. KIRKPATRICK, *Secretary.*
CENTRAL ELECTRIC RY. CO.,
(Signed) By BERNARD CORRIGAN, *President.*
(Signed) W. E. KIRKPATRICK, *Secretary.*
KANSAS CITY ELEVATED RY. CO.,
(Signed) By BERNARD CORRIGAN, *President.*
(Signed) W. E. KIRKPATRICK, *Secretary.*
THE KANSAS CITY-WESTERN RAILWAY COMPANY,
(Signer) By C. F. HOLMES, *President.*
(Signed) S. D. HUTCHINGS, *Secretary.*

Approved as to form.
(Signed) JOHN H. LUCAS,
General Solicitor.

Approved as to form.
(Signed) C. F. HUTCHINGS,
General Attorney.

Copy.

M."

Cross-examination by Mr. ATWOOD:

Q. You say the legal department. Who is the legal department?
A. Mr. Lucas is the general attorney.
Q. He had been in times gone by, and perhaps is now, attorney for the Metropolitan?
A. Yes, sir.
Q. The Metropolitan is still a corporate entity?
A. Yes, sir.
Q. This property is in the hands—in the control or under
193 the management of the Receivers?
A. Yes, sir.
Q. So it is in the hands of Mr. Lucas, as the attorney for the Metropolitan or attorney for the Receivers?
A. Not giving any legal opinion, I would say both.

Mr. ATWOOD: We object to Exhibit "5" as incompetent, irrelevant and immaterial, and as to the plaintiff, hearsay, because it purports to be a contract or agreement made between the defendant and another company not a party to this suit to which the plaintiff is not privy.

The objection was by the court overruled.

Mr. COWHERD: I have here copies of these two papers, to leave here.

Mr. ATWOOD: Do you know they are copies?

Mr. COWHERD: I haven't compared them. I am relying upon Mr. Cole. He says they are and he has compared them.

Mr. ATWOOD: All right.

Mr. COWHERD: In place of the two exhibits which have been offered, we substitute in their place these, marked "4" and "5."

Cross-examination (continued) by Mr. ATWOOD:

Q. You are acting as Auditor of the Receivers?
A. Yes, sir.
Q. You used to be Auditor of the Metropolitan?
A. Yes, sir.
Q. The business of transporting passengers for hire in this city is being conducted by receivers of the Metropolitan Street Railway Company appointed by the Federal Court of this District?
A. Yes, sir.
194 Q. Mr. Dunham and Mr. Harvey are the receivers?
A. Yes, sir.
Q. You derive your authority as auditor now from those two gentlemen in their business capacity?
A. Yes, sir.
Q. By reason of this position of yours, you have to do with the auditing of accounts?
A. Yes, sir.
Q. For the receivers?
A. Yes, sir.
Q. Speaking in the light of the knowledge that is yours, and your connection with the affairs of the receivers, are they operating any

cars under any contract with the Kansas City Western Railway Company?

Mr. COWHERD: Objected to as calling for a conclusion, and incompetent and immaterial, and as calling for a legal conclusion of the witness.

The objection was by the court overruled. To which ruling of the court the defendant then and there duly excepted.

A. They are not.

Q. Something has been said about bills being presented for some moneys that the Kansas City Western claims to have paid in the way of wages for some of their help, being presented to the receivers to be paid by the receivers for the Kansas City Western. Do you have knowledge of such bills?

A. Yes, sir.

Q. Did you pay them?

A. No, sir.

Q. You have not, since the receivership?

A. No, sir.

Q. And why?

195 Mr. COWHERD: I don't believe that is competent as to why they haven't paid the bills.

Mr. ATWOOD: The point I had in mind was this, Mr. Cowherd suggested the other day that sometimes bills were not paid because they didn't have the money. What I want to know is whether it is insufficiency of funds or because they didn't recognize the validity of any such claims.

Mr. COWHERD: Sometimes a man refuses to recognize a claim for insufficiency of funds when he don't give that reason, and I think that is an incompetent question.

The objection was by the court overruled. To which ruling of the court the defendant then and there duly excepted.

A. I don't believe I can tell you why, it isn't paid—I am only acting on the advice of my superior in that.

Q. Who is your immediate superior?

A. Mr. Clarke is the comptroller.

Q. And your instructions in relation to this is what?

A. Not to pay them.

Q. Now do you know the division of the revenues derived from the fares paid by passengers upon the Kansas City Western cars while on the tracks and under the control of the Receivers of the Metropolitan, collected by the conductors of the Metropolitan—how they are divided?

A. Yes, sir.

Q. 20 per cent to the Kansas City Western and eighty per cent to the Receivers?

A. Yes, sir; as I explained yesterday.

196 Redirect examination by Mr. COWHERD:

Q. Do you know whether or not the cars received from the Kansas City Western at 18th and Central, are operated over the

Metropolitan line under the receivership just as they were before the receivership?

A. Well, the operation of the cars is something that is entirely out of my department. I know the division—that is all.

Q. Are the bills sent to the receivers just as they were sent before to the Metropolitan Street Railway Company by the Kansas City Western for the wages of the men operating the cars?

A. Yes, sir.

Q. The only difference is, you paid them before, and since the receivership you haven't paid those bills?

A. That is right.

Dr. C. K. VAUGHAN, having been duly sworn as a witness for the defendant, testified as follows:

Direct examination by Judge MOORE:

Q. State your name?

A. C. K. Vaughan.

Q. Where do you reside?

A. In Leavenworth, Kansas.

Q. How long have you lived there?

A. About 15 years.

Q. What is your occupation?

A. Physician.

Q. How long have you been a physician?

A. 15 years.

Q. What medical schools are you a graduate of?

A. The Memphis Hospital medical college, Memphis, Tennessee.

197 Q. How long have you practiced medicine and surgery in Leavenworth?

A. Fifteen years.

Q. Are you connected with any hospital?

A. Why, I am one of the faculty in the training school.

Q. Where is that located?

A. In Leavenworth.

Q. Are you one of the local surgeons of the Kansas City Western Railway Company?

A. Yes, sir.

Q. Are you acquainted with the plaintiff in this case, Mr. McAdow?

A. Yes, sir.

Q. When did you first become acquainted with him?

A. At the time of the accident.

Q. On the 18th of December, 1911?

A. Yes, sir.

Q. I will ask you to state to the jury where he was when you first saw him and under what circumstances?

A. He was sitting in the office, I suppose you would call it, of the car barn at Wolcott.

Q. How did you happen to see him there?

A. I had been called down there to attend injured persons in that accident.

Q. Go on and state where you saw Mr. McAdow after that—if he went to Leavenworth tell the jury what happened?

A. Well, they fixed up a car and we took the people back to Leavenworth, that were injured, took them to the Cushing Hospital, there I made my first examination.

Q. Tell what examination you made and what you found?

A. We stripped him and made a thorough examination of him. And found no objective symptoms of injury. He complained of pain and soreness in the muscles of the back and neck and left side.

198 Q. Did you find any broken ribs?

A. No, sir.

Q. Did you find any bones broken around the shoulder?

A. I did not.

Q. Did you put any bandages on his body?

A. I put some adhesive strips on his left side.

Q. For what purpose?

A. To fix the muscles, because he complained of soreness and pain in them.

Q. That was on the 18th, you say, of December?

A. Yes, sir.

Q. Go on and tell the jury about how often you saw him there, as long as he was in the hospital?

A. I saw him every day at first. I presume I saw him every day while he was there—he was there until about the first of January—practically two weeks.

Q. Tell the jury what his condition was at the time he left the hospital?

A. His condition was good. He still complained of some soreness in his side and back. He seemed to be recovering from his scare.

Q. Did you ever tell him that he had two broken ribs?

A. No, sir.

Q. Did you have any conversation at all with him in reference to his ribs or any rib?

A. I don't remember whether I did or not.

Q. Did you observe—from your examination did you find anything abnormal with his nervous system and conditions?

A. No, sir; I did not, except that he was scared, he naturally would be.

Q. Was there any break in the shoulder blade?

A. No, sir.

199 Cross-examination by Mr. ATWOOD:

Q. You know in a general way the causes that brought about your being sent for to go to Wolcott?

A. I know there had been an accident.

Q. Did you see the cars?

A. Yes, sir; I saw them.

Q. For the purpose of getting some knowledge of the violence

of the impact of the two, they evidenced the fact that there had been a violent head-on collision, did they not?

A. Yes, sir.

Q. You said a minute ago, very naturally—or something to that effect—he would be frightened by that occurrence?

A. Yes, sir.

Q. When anyone is in a wreck of that sort, isn't there, in a normal person, a violent mental shock?

A. That depends on the person.

Q. I say an average, normal person? I am speaking of an average person, like me, or the jury—isn't there usually a natural shock in such an experience?

A. I presume so.

Q. You had adhesive plasters on what portion of this man?

A. I couldn't give you that, in square inches.

Q. Give me some idea, about how much of this man's body was covered by the plasters?

A. I should say about this section of his body was covered (indicating).

Q. Beginning where?

A. The muscles that he wanted fixed were on the left side and back and so consequently we put the plasters about in there, I suppose (showing).

200 Q. How high did they go—indicate there about how high—on my back?

A. Possibly up about here (pointing).

Q. About where?

A. About the right shoulder—from the right shoulder to the back in the middle.

Q. And extended from here, across the back, to the left arm?

A. Yes, sir.

Q. And how far from the abdomen?

A. Probably about the mid-line.

Q. Now, adhesive plasters applied in that way are sometimes used when there is a fracture of the ribs?

A. It wouldn't be applied that way.

Q. Adhesive plaster is employed as a binder sometimes if there is a fracture?

A. Yes, sir; and for many other causes.

Q. It is not an unusual treatment to bind the fractured portions together with adhesive plaster?

A. That would be the usual practice.

Q. That is frequently done?

A. Always.

Q. You say you haven't any recollection sufficiently clear to enable you to describe the position these plasters were?

A. I said I couldn't give you the definite limits.

Q. You are speaking of what the practice was—what you do under such circumstances?

A. Under similar circumstances, yes, sir.

Q. Do I understand now from that, that you haven't a distinct

recollection as to the area covered or the dimensions of the adhesive plasters employed by you on that occasion?

A. I have already stated I had not, as to the definite limits.

201 Q. You have not a distinct recollection about all the other matters?

A. You are too general when you say that.

Q. How many people did you treat on that day, down there, and to what extent?

A. I couldn't tell you that.

Q. Do you know how many people were on this train there that day?

A. I couldn't tell you that without referring to my notes.

Q. Are you now testifying from a recent examination of your notes?

A. Yes, sir.

Q. Or from your independent recollection?

A. From both.

Q. Now, there is no reason why you should remember Mr. McAdow's case independent of your notes, any more clearly than any other person you treated on that day, is there?

A. Yes, there is—do you want to know the reason?

Q. Do you remember a man named Worsfold?

A. I don't get that name very clearly.

Q. Do you remember treating anybody else that was injured in that wreck, besides George McAdow?

A. Yes, sir.

Q. Who?

A. Well, I remember Mr. Bradley.

Q. He was a conductor on one of the cars?

A. Yes, sir.

Q. Who else?

A. A painter—he had a piece of glass in his buttock—I don't remember his name.

Q. Are those the only ones you recollect?

A. And I remember treating several others. I am not very good at remembering names.

202 Q. What number?

A. I couldn't give you the definite number, as I told you awhile ago. You must remember we were all under a considerable strain that day, Mr. Atwood.

Q. That was what I was after—that your recollection would not be as acute as a man's that had his ribs broken.

A. We wouldn't try to remember names on such an occasion, but we should remember what we found.

Q. You say you don't even remember the number of people that you treated?

A. I couldn't give you the definite number.

Q. Did you examine those that were dead?

A. Yes, sir.

Q. How many were there dead in the wreck?

A. Two or three altogether that terminated that day.

Q. How many were killed outright?
A. One.
Q. How many?
A. Shortly thereafter, two.
Q. Were there any other deaths as the result of this collision, to your knowledge?
A. No, sir.
Q. Now, do you recollect what you did for these others—the indefinite others—whether there were ten or five?
A. I treated one man for a piece of glass, as I have explained to you, in his buttocks—Bradley had practically no injury—he was a little sore.
Q. I think you said a painter was one?
A. Yes, he was the one that had the glass. I will tell you, to make this clear, there were three of us treating these cases—and some of them we saw together the first time, and some later—this time occupied about two weeks.
203 Q. Now, let us confine it, if you will permit me to do so for the present, to those attended to at the wreck. Of course, you are not responsible for the treatment given by your brother doctors—you don't remember the number of persons you treated? You do recollect this piece of glass in the posterior portion of the painter's anatomy—you remember that?
A. Yes, sir.
Q. Do you remember the location of the ailments that any of the others had?
A. When we first arrived we immediately went to work on the man that seemed to be hurt—who had his two legs broken.
Q. Do you remember his name?
A. I don't remember his name—he died shortly afterwards.
Q. And then you came to the painter with a piece of glass?
A. No; we put splints on this man's legs and that kept us all the time until the car was ready to take the men to Leavenworth. We helped put that man on the car and I stayed with the two men that were hurt the worst because they needed constant attention. Dr. Combs went around among those that were suffering with pain, and gave them hypodermics to relieve the pain. Dr. Everhardy and I took charge of those most severely hurt.
Q. Now, speaking of the painter, I want to get at the injury that the painter was suffering from.
A. Well, there was a piece of glass in the buttocks that we had to go to work and remove right away, as soon as we got him to the hospital.
Q. That was all of his injuries?
A. He had some little minor bruises.
204 Q. Where were the other minor bruises?
A. I can't give that. I imagine the details of that kind would slip most individual's minds.
Q. I am not criticising your memory—if you tell us the best you can, that is all we can ask. You don't remember the injuries the painter had outside of the piece of glass in the rear portion of his person—it is hard to make a statement from memory?

A. That is the idea.
Q. Mr. Worsfold—was that the painter that you treated?
A. No, sir.
Q. Did you treat him at all (pointing)?
A. If I treated him it was for some slight thing.
Q. For troubles that didn't make any impression on your memory?
A. Yes, sir.
Q. Would you consider a cut, here, from the chin down, running down to here, and the blood scattered over his person, a trivial injury?
A. No, sir.
Q. You would remember that?
A. Yes, sir, certainly.
Q. As to the injuries this man sustained, you, of course, don't know. You haven't seen him or examined him since he left the hospital?
A. I haven't seen him since he left the hospital.
Q. And his present condition you know nothing of?
A. No.
Q. Did you remove the plasters at any time after they were put on?
A. No. My recollection is we left them on.
Q. You don't recollect the circumstance of being called
205 into the hospital for the purpose of readjusting the adhesive bandages?
A. I might very likely have readjusted them.
Q. You have been practicing how long?
A. Fifteen years.
Q. You have had more or less to do with derangement of the nerves resulting from injury?
A. Yes, sir.
Q. You don't pretend to be a specialist on that particular branch of your profession, but you have some knowledge of it as a general practitioner?
A. Yes, sir.
Q. It is a fact, is it not, that very serious nerve derangements follow injuries such as experienced by Mr. McAdow—provided there is inflammation—you know the history of this case?
A. Such things can happen.
Q. Under the names of traumatic neurasthenia, or traumatic hysteria—they are names given to conditions that result from such experiences as this?
A. I can't say from such experiences as this.
Q. As you understand from the history of the case, that the man went through a head-on collision?
A. I would have to find some serious injury before I could expect any such condition to develop.
Q. Don't you know it is a recognized fact among physicians that there may be what learned physicians describe as traumatic hysteria when there isn't a single mark on any portion of the person, as the

result of shock—though it doesn't result in the marking of the tissues on the surface?

206 A. The term "trauma" means that there must be some injury, which we call traumatic.

Q. Can't there be an injury without the marking of the surface?

A. Possibly.

Q. Do you know Dr. Burnett?

A. I do not except by reputation.

Q. Do you know him by reputation?

A. I have been reading of him at times in the papers—that is the only way I know.

Q. You were not the one that advised the counsel on the other side to employ Dr. Burnett to examine Mr. McAdow?

A. No, sir.

Q. If a person's body was twisted——

Mr. COWHERD (interrupting): Objected to as incompetent, irrelevant and immaterial.

Mr. ATWOOD: The question is withdrawn.

Q. If a person's body was twisted by a violent collision of two cars so there would be a wrenching of the body without a marking of the surface, can't there be produced what you doctors would call a trauma?

A. That might not mark the surface, but he certainly would have some symptoms to show that condition at the time.

Q. How soon after would these neurasthenic symptoms evidence themselves?

A. The symptoms might not show for some time.

Q. If Mr. McAdow had been so injured, at the time he left the hospital those symptoms might not have manifested themselves to a doctor who was there and put on adhesive plasters?

A. There certainly would be some symptoms to show it at that time.

Q. Now, as to traumatic hysteria, that is accompanied by

207 abrasions and bruising of the tissues, is it, invariably?

A. Not necessarily—that is, on the surface tissue. But if there is trauma, he must have injury to tissues somewhere.

Q. And when you have sore muscles—that don't indicate there was some sort of wrenching or injury to the muscles?

A. Probably a strain.

Q. Why do you say probably a strain?

A. Because there might be a bruise instead of a strain.

Q. At the time you first saw him he complained of pain and soreness up and down his back?

A. Yes, sir.

Q. To such an extent you put adhesive plasters on, that are used to keep broken bones together?

A. If a man complains of pain at all you would put on adhesive strips to fix the muscles.

Q. You put it on to fix the condition of those muscles, didn't you?

A. I put it on to fix the muscles.
Q. Because of the condition of the muscles?
A. Because he said he had pain.
Q. Because of the condition of the different muscles you would't put them on an entirely healthy person?
A. He said it hurt to move those muscles.
Q. Did you ascertain whether or not his muscles were sore and tender by making digital examination?
A. I made a digital examination, but I couldn't see it.
Q. You treated his case on the hypothesis of the muscles being sore?
A. Yes, sir; because he said it was.
Q. You assumed the soreness of the muscles was due to some injury sustained in that wreck, didn't you?
A. Yes, sir.

208 Redirect examination by Judge MOORE:

Q. Tell the jury how many times you examined Mr. McAdow while he was in the hospital, after he first went there?
A. I saw him I think every day for a while and then probably every other day.
Q. Up until the time he left?
A. For about two weeks.
Q. Speaking of these adhesive plasters, if a man's ribs had been broken would you have placed the adhesive plasters there in the same manner you did place them on Mr. McAdow?

Mr. MCADOW: Objected to because the witness has already stated he didn't remember just how he placed it on Mr. McAdow.

Q. In other words, tell how you would have placed it for a broken rib?
A. In placing it for a broken rib, I would run the plaster straight around the chest.
Q. Well, now, if the break had been out from the spine, how would you do it?
A. Straight around the chest.
Q. At right angles?
A. Yes, sir.
Q. State whether or not you found any indications of any severe wrenching of the body of Mr. McAdow, or strain?
A. I did not.
Q. From your examination?
A. No, sir.

Recross-examination by Mr. ATWOOD:

Q. Did Dr. Everhardy attend the patient more than once, to your knowledge?
A. Yes, sir.
Q. In company with you?
A. Yes, sir.
209 Q. How many times?
A. Twice, to my knowledge.

Q. Once at Wolcott and once at the hospital?
A. Yes, sir.
Q. Well, after the day of the injury, did Dr. Everhardy attend the patient?
A. He saw him with me, yes.
Q. After the day of the injury?
A. Yes, sir.
Q. How many times?
A. I told you to my knowledge he had seen him with me once since the time at Wolcott.
Q. Three of you went down to Wolcott?
A. Yes, sir.
Q. Did the other two doctors see Mr. McAdow at Wolcott, as far as you know?
A. Yes, sir.
Q. And then you all went to the hospital?
A. Yes, sir.
Q. And the treatment, such as you gave him, was started?
A. Yes, sir.
Q. How long after he was there did Everhardy see the patient again?
A. I couldn't tell you.
Q. Several days, you think?
A. Several days.
Q. And Dr. Combs, did he attend this man McAdow more than once or at all?
A. He saw him with me at the hospital, during the time he was there, some time, but I can't tell you what day it was.
Q. And did either of them assist you in what you did do for McAdow?
A. Dr. Everhardy examined him with me and helped me with the adhesive straps when they were put on.
210 Q. How about Combs?
A. Combs didn't have anything to do with it.
Q. Did Combs make an examination of McAdow in your presence?
A. Yes, sir.
Q. When was that?
A. At Wolcott.
Q. As far as you know he made no examination of McAdow after he left the hospital?
A. The hospital?
Q. At the time you and Everhardy were treating him?
A. It was another time.
Q. Did you call him to assist you in examining or determining the injury or ailment of McAdow?
A. I presume I did.
Q. And did you call Everhardy for the purpose of treating it and determining the injury?
A. I did.
Q. The injury was such you were not willing to rest upon your judgment about what should be done and the extent of the injury?

A. That wasn't the reason.

Q. At any rate, did you feel yourself competent to treat a man with a slight bruise on the nose anad a little cut on the head, if there was no injury beyond that?

A. That would depend on circumstances.

Q. What do you think of your ability to treat a case of that sort; your ability is the same under all circumstances, isn't it—when you are sober, I mean?

A. Yes, sir.

Q. Don't you consider yourself quite capable——

Mr. COWHERD: That wasn't a fair suggestion, in regard to his being sober, without you have evidence in regard to that.

211 Mr. ATWOOD: I think the jury can judge the fairness or unfairness.

Mr. COWHERD: I submit that it is not proper.

The COURT: It is proper cross examination.

Mr. COWHERD: I want to except to the statement of counsel, and insist that in view of the statement of counsel the jury be discharged, unless it was intended to reflect upon the doctor as a practitioner and unless they intend to follow it up with proof of that character.

The COURT: Proceed with your examination.

To which ruling of the court the defendant then and there duly excepted.

Q. I will ask you as a medical expert, if a man's ability as a physician or as a lawyer or a judge is the same when he is sober as when he is intoxicated?

A. It certainly isn't.

Q. Consequently it is entirely proper to qualify a man—the lawyers are the same—if intoxicated they are, to an extent, incapable.

Mr. COWHERD: I object to this question being put to the doctor.

Mr. ATWOOD: The question is withdrawn.

Q. Now, then, doctor, so far as this case is concerned, was there any time that you didn't deem your ability sufficient to properly diagnose and treat that case of injury, where the injury was no more pronounced than a cut on the head—not a fracture of the skull—and an abrasion on the nose?

A. No, sir.

Redirect examination by Judge MOORE:

Q. Tell the jury why you called in other doctors and

212 surgeons?

A. Because I wanted a thorough examination made of the man by more than one, having a suspicion that such a thing as this might occur.

Q. Did you have these doctors attend other patients with you than McAdow?

A. Yes, sir; the primary reason for taking the other doctors was because there was more business there than I could handle in the time allotted.

Recross-examination by Mr. ATWOOD:

Q. Meaning that the injury was of such a character that litigation might result and you wanted to try to fix the evidence right before you started. Is that it?
A. No, sir.

Dr. J. L. EVERHARDY, having been duly sworn as a witness for the defendant, testified as follows:

Direct examination by Judge MOORE:

Q. Where do you reside?
A. Leavenworth.
Q. How long have you lived there?
A. All my life. Do you want how many years?
Q. Yes, sir.
A. Thirty-nine years.
Q. What is your occupation?
A. Physician and surgeon.
Q. How long have you been a physician and surgeon?
A. 16 years.
Q. Where have you been practicing during those 16 years?
A. In Leavenworth.
Q. Have you a hospital?
A. No, sir.
Q. Any official position as surgeon or physician?
A. No.
213 Q. Do you remember of being called, on December 18th, 1911, at the time of an accident on the Kansas City Western Railway, to attend to the persons injured?
A. Yes, sir; I do.
Q. Do you remember of seeing the plaintiff in this case, Mr. McAdow?
A. Yes, sir.
Q. Tell the jury where you went and saw Mr. McAdow?
A. Dr. Vaughan, the surgeon of the Kansas City Western, called me up in the morning about 7:40, and asked me to come down to the car barn, to go down to the wreck at Wolcott, and I went down with him and Dr. Combs.
Q. When you got down there did you see the plaintiff in this case?
A. Yes, sir.
Q. Did you make an examination of him?
A. Yes, sir.
Q. What did you do down there with reference to attending the plaintiff's injuries?
A. All I did there, I went to take care of him, and he told me to take care of another man first, and I put a pillow back of his neck, and that is all I did there.
Q. Mr. McAdow told you to take care of somebody else first?
A. Yes, sir.
Q. Did he say anything at the time?

A. First I thought he was an old Vet, from seeing the brass buttons and blue coat.

Q. You thought he was an old soldier?

A. Yes, we called them "Old Vets," being at Leavenworth. I told him if he wasn't hurt very bad we would let him go up to the
214 Soldiers' Home. He said he didn't belong to the Soldiers' Home. I said "where do you live?" he said "Kansas City," and he wanted to come on down here. I told him Dr. Vaughan would talk to him, and afterwards we came on up and he went to the Cushing Hospital.

Q. After you got up there what did you do with reference to Mr. McAdow?

A. With Dr. Vaughan, I made a thorough examination of his whole body, and found he was bruised about the neck and similarly in the back, and on the left lower ribs, and I assisted Dr. Vaughan to put on adhesive strips to immobilize the chest.

Q. What do you mean by immobilizing the chest?

A. Made it rest so the muscles wouldn't move and hurt him.

Q. Did you find any broken bones around the shoulder?

A. No, not at all.

Q. Did you find any broken bones any place around his body?

A. No place.

Q. How many times did you see him while he was in the hospital?

A. Twice.

Q. Doctor, all this time did you find any broken ribs?

A. No.

Q. Why were you putting bandages on his body?

A. To rest the muscles of his back and chest.

Q. Do you remember when he left the hospital?

A. No, I do not.

Q. How long before he left did you see him?

A. Well, I don't know when he left. I saw him the second time about a week after he was injured.

215 Q. Did you ever see him after that?

A. No, sir. That is the second time at the hospital.

Q. From your examination did you find any abnormal condition of his nervous system?

A. He was frightened and was worried, it seemed, to get home, at that time, more than anything.

Cross-examination by Mr. Atwood:

Q. Where were the bruises, doctor?

A. Do you mean discolorations?

Q. The ones you spoke about?

A. He was tender on the neck, between the shoulder blades—down the small of his back—to use common words; and over the left lower ribs. There weren't any cuts nor discolorations.

Q. Did you help adjust the bandages?

A. They were not what we call bandages—adhesive plasters.

Q. That is what I am talking about?

A. Yes, sir.

Q. You saw him, you say, a couple of times?
A. Once afterwards.
Q. Did you see anybody else that day, doctor, in connection with your business down there?
A. Yes, sir.
Q. Who were they—how many did you treat?
A. Well, there was one man there, right across from the motorman, had a piece of glass in his left thigh; and the conductor was lying to Mr. McAdow's right, and perhaps there were two other men there—there was the motorman and conductor, and there was the painter in another room, and there were two passengers.

Q. What was the condition of the motorman, the one you
216 have just spoken of?

A. Oh, he had six ribs broken, and his legs were broken.
Q. Do you remember his name?
A. No.
Q. Do you remember the conductor's name?
A. Yes, Brady was the conductor, going down.
Q. Did you treat him alone or with somebody else?
A. Both.
Q. What was the matter with the painter?
A. The painter went over against the seat in front of him.
Q. How many passengers were treated by the doctors there, as you recall it, as far as you know?
A. None.
Q. The injured were all employees as you understand it?
A. Yes, sir.
Q. Was there more than one painter?
A. Not that I recollect it.
Q. Dr. Vaughan helped you treat him?
A. No, I helped Dr. Vaughan treat him.
Q. Dr. Vaughan and you together treated the painter?
A. Yes, sir.
Q. Stand up, Mr. Worsfold; is that the painter you treated (pointing)?
A. Yes, sir.
Q. That is the one you and Dr. Vaughan treated together?
A. Yes, sir.

Mr. COWHERD: We offer the testimony of Dr. Charles M. Stemen.
Mr. ATWOOD: I think the whole of the affidavit should be read.
Mr. COWHERD: I think the only part that is competent is the testimony of the witness.

217 Mr. ATWOOD: It is an affidavit for continuance, which embodies what they think the doctor would testify.

Mr. COWHERD: It is admitted that this would be the doctor's testimony, if present, and that is the part we offer.
The COURT: That is right.
Mr. ATWOOD: I don't want it to appear that Dr. Stemen himself has sworn to that.
Mr. COWHERD: I object to that statement, and ask that the jury

be discharged. We have a right to have his case tried according to the law, and that is an improper statement.

Mr. ATWOOD: The statement is withdrawn.

Mr. COWHERD: Did the court overrule my motion?

The COURT: Yes, sir. Go ahead and read the testimony.

To which ruling of the court the defendant then and there duly excepted.

The said testimony of CHARLES M. STEMEN is as follows:

"My name is Charles M. Stemen; I reside at Seventh and Nebraska Avenue, Kansas City, Kansas. I am a practicing physician and surgeon in that city and have been engaged in the general practice of medicine and surgery for more than twenty years. I am a graduate of a medical college and am chief surgeon at the Bethany Hospital in Kansas City, Kansas. On or about the — day of —— I
218 was requested by the defendant in this case to call upon plaintiff, George B. McAdow, at his home in Kansas City, Kansas, and make an examination of him to discover what if any injuries he had received in a collision between two of defendant's cars on December 18, 1911. This was shortly after said date. I found plaintiff at home and made a careful examination of his person. I went over plaintiff carefully for the purpose of discovering if possible what, if any, injuries he had received. I could find nothing that would indicate he had ever had an injury. He complained of a pain in his back, but I found no objective symptoms to indicate the receipt of any injury that would cause such pain. At the time I visited plaintiff he was wearing an adhesive dressing which I removed in order to make this examination. There had been no ribs broken and no indication of any fracture of any rib or tearing of any ligaments."

Dr. G. R. COMBS, having been duly sworn as a witness for the defendant, testified as follows:

Direct examination by Judge MOORE:

Q. State your name, please?
A. G. R. Combs.
Q. Where do you reside?
A. Leavenworth.
Q. How long have you lived there?
A. Thirty-four years.
Q. What is your occupation?
A. Physician and surgeon.
Q. How long have you been in the practice of medicine and surgery?
A. Since 1902—eleven years.
Q. During all that time, in Leavenworth?
A. No, sir; three years and a half in Philadelphia.
219 Q. What doing, there—in any hospital?
A. A hospital interne.
Q. What hospital?

A. The German Hospital and the Kensington Hospital for Women.

Q. To make the matter short, on the 18th of December, 1911, were you called to assist Dr. Vaughan and Dr. Everhardy to attend persons injured on the Kansas City Western road?

A. Yes, sir.

Q. At that time did you see the plaintiff, Mr. McAdow?

A. Yes, sir.

Q. Where did you first see him?

A. I think he was the first one we saw, when we went in the room where the injured parties were at Wolcott.

Q. Did you make any examination of him then and there?

A. I felt his pulse and looked at him, just a cursory examination.

Q. Did you do anything for him at that time and place?

A. I gave him a hypodermic; he was rather nervous; I was administering a hypodermic to quiet them—that was all.

Q. Hypodermic of what?

A. Gave him some morphine.

Q. Just tell the jury in your own language when you saw him next, and if you went to the hospital with him what was done?

A. He was taken to Leavenworth in a car, and from there was taken to Cushing Hospital. The next time I examined him was at Cushing Hospital, later on in the afternoon.

Q. Did you see him at Cushing Hospital that same day?

A. Yes, sir.

220 Q. Did you help attend him or treat him in any way, that day?

A. I did.

Q. What did you do?

A. We stripped him and went over him thoroughly; made a thorough and complete examination of him, with the clothing all removed.

Q. Did you find any bones broken around the shoulder?

A. No, sir.

Q. Any broken ribs?

A. I found no broken ribs. I found some tenderness over one of the ribs. There was no symptoms of fracture except the local pain.

Q. Did you put any strips of plaster on his body at any time?

A. No, sir. Not there at the time.

Q. When did you?

A. Later on we put some strips on him.

Q. About when?

A. Well, Dr. Vaughan did, later on in the day.

Q. That same day?

A. Yes, sir.

Q. Well, did you see him more than once that day?

A. No, at Wolcott and at the hospital.

Q. Were you ever at the hospital at Leavenworth again?

A. No, sir; not more than once.

Q. How often did you see him after that during the time he was at the hospital?

A. Once after that.

Q. When was it—do you remember?

A. I couldn't tell you that date; no, sir; but several days after the accident.

Q. Doctor, any time you saw him or any examination you made, did you ever find any broken bones in any portion of the body?

A. No, sir; our later examination disclosed the fact that he had no broken bones.

221 Q. From the time you first say him at the hospital, the first day, to the last time you saw him, tell the jury whether or not he had changed in his condition?

A. Well, all his symptoms of any broken bones had disappeared and there were no symptoms of that kind at all, and he was apparently in normal condition.

Q. In a normal condition the last time you saw him?

A. Yes, sir.

Cross-examination by Mr. ATWOOD:

Q. That was a year ago—something like that?

A. Yes, sir.

Q. Did you make any memorandum of the result of your examination, on either of the occasions, doctor—sometimes I know you doctors do keep a record at the time of making an examination?

A. I don't think I made an official report—I didn't look upon it as my case.

Q. Have you anywhere now a memorandum of the result of your examinations?

A. I don't think so, Mr. Atwood.

Q. And you are testifying now simply from your recollection, unaided by any memorandum?

A. Yes, sir.

Q. You are a physician of a pretty large practice, you used to be, and are yet?

A. I still work; yes.

Q. A great many patients. That is all.

Judge MOORE: I introduce in evidence the amended petition of the plaintiff in this case, filed August 16th, 1912, in this court.

The said amended petition is as follows:

222 "In the Circuit Court of Jackson County, Missouri, at Kansas City, May Term, 1912.

Number 63472.

GEORGE MCADOW, Plaintiff,
vs.
THE KANSAS CITY WESTERN RAILWAY COMPANY (a Corporation), Defendant.

Amended Petition.

Comes now plaintiff above named, and leave of court being first had and obtained, files herein his amended petition, and for his cause of action against the defendant herein states:

That he is now and was at all times herein mentioned a citizen of the State of Kansas; that the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Kansas, and is not incorporated under the laws of the State of Missouri; that the said defendant is a railway corporation and common carrier of passengers for hire, owning, operating and maintaining a line of electric railway extending from Leavenworth, Kansas, in a southeasterly direction into and through the Town of Wolcott, Kansas, south into Kansas City, Kansas.

Plaintiff alleges that on December 18th, 1911, and for a long time prior thereto he was in the employ of the defendant company in the capacity of a motorman, and it was his duty and he was engaged in the work of a motorman for defendant operating electric cars owned, controlled and operated by the defendant company over the tracks of said company running from Kansas City, Kansas, to Leavenworth, Kansas, and return, that on said 18th day of December, 1911, at about the hour of six thirty A. M. of said day he was operating
223 a car belonging to the defendant and maintained and operated by it, known as Passenger Car No. 21, running in a northern direction between Kansas City, Kansas, and Leavenworth, Kansas, operated by the defendant over its said tracks.

Plaintiff alleges that when the car which he was at the time operating for the defendant, in obedience to the orders and directions of his superior officers, had reached a point about one-half mile south of Wolcott Station, at or near what is known as "Connors Creek Bridge," another car belonging to the defendant and being at the time operated by the defendant, its agents, servants and employees, moving at the time in an opposite direction with great speed, collided with the car being operated by the plaintiff with great force and violence, injuring plaintiff in the manner hereinafter described.

Plaintiff alleges that at all times herein mentioned he was operating his car in obedience to the orders and directions of the defendant, its superintending agents and employees; that at all times herein mentioned he was in the exercise of due care and caution for his own safety, and that the defendant was negligent and careless in not

providing plaintiff with a clear track and in allowing and permitting another car owned, operated and controlled by the defendant and being at the time operated by the defendant, its agents, servants and employees on the same track in an opposite direction, to collide with and run into the car which plaintiff was at the time operating.

Plaintiff alleges that the cause of action herein stated accrued to him in the State of Kansas and is governed and controlled
224 by the laws of the State of Kansas; that said cause of action accrued herein on the 18th day of December, 1911, and that he filed his original petition in this cause on the 8th day of February, 1912; that said cause of action is not barred by any statute of limitations of the State of Kansas; that his right of action herein, under and by virtue of the laws of the State of Kansas, is not barred until two years after its accrual; that the law of limitations applying to this cause of action is Section 5610 of the General Statutes of Kansas, 1909, at page 1226, and is in words and figures as follows, to-wit:

"5610. Actions Other Than for the Recovery of Real Property. 17. Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:

First, * * *

Second, * * *

Third, Within two years: An action for trespass upon real property; an action for taking, detaining or injuring personal property; including actions for the specific recovery of personal property; an action for injury to the rights of another, not arising on contract, and not hereinafter enumerated; an action for relief on the ground of fraud, the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud." * * *

Plaintiff alleges that by the provision of the law of the State of Kansas above set forth he brought his action herein within
225 the time allowed by the statute of limitations of said state.

Plaintiff alleges that the cause of action herein was commenced within eight months of the time of his injury when said cause of action accrued to him, which said time is within the statutory requirements of the laws of the State of Kansas governing the giving of notices in actions of this kind; that said laws of the State of Kansas *is* to be found in the General Statutes of Kansas, 1909, at page 1490, the same being Section 6999, and is in words and figures as follows, to-wit:

"6999. To Employe; Notice. 22. Eve-y railroad company organized or doing business in the State of Kansas shall be liable for all damages done to any employee of said company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees, to any person sustaining such damage: Provided, That notice in writing that an injury has been sustained, stating the time and place thereof, shall have been given by or on behalf of the person injured, to such railroad company within eight months after the occurrence of the injury: Provided, however, That where an action is commenced by the injured person within said eight months, it shall not be necessary to give said notice: And pro-

vided further, that where any person injured is in the hospital of or under the charge of the railroad company causing the injury, or is prevented by the effects of said injury, the said eight months shall not begin to run until such injured person is discharged from said hospital or care of said railroad company, or until such disa-
226 bility be removed: Provided, further, that in case said injured person shall die, as a result of said injuries, within said eight months, it shall not be necessary to give said notice: Provided, further, that said notice need not state whether or not suit is intended to be brought."

Plaintiff alleges that said law of the State of Kansas was in full force and effect at the time of said injury to plaintiff and that plaintiff has complied with said statutory requirement by bringing his action within the eight months after the occurrence of his injury.

Plaintiff alleges that there was at the time of his injury and now is in full force and effect a law of the State of Kansas, duly enacted by the Legislature of said state, which applies to employees of railroad companies such as the railway company herein mentioned and employees such as plaintiff working for said railroad companies, which governs and controls the liability of said railway company for injury to its employees occurring in certain cases, such as the injury which occurred to plaintiff, said law and legislative enactment of the State of Kansas being House Bill No. 240, entitled "An Act relating to the liability of common carriers by railroads to their employees in certain cases, and repealing all acts and parts of acts so far as the same are in conflict herewith," said law being fully set forth in the Session Laws of Kansas, 1911, at page 437 thereof, which reads as follows, to-wit:

"SECTION 1. That every company, corporation, receiver or other person operating any railroad in this state shall be liable in
227 damages to any person suffering injury while he is employed by such carrier operating such railroad or in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow and children or husband and children, or children, or mother or father of the deceased, and if none, then the next of kin dependent upon such employee for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier; or by reason of any insufficiency of clearance of obstructions, of strength of road bed and tracks or structure, of machinery and equipment, of lights and signals, or rules and regulations and of number of employees to perform the particular duties with safety to themselves and their co-employees, or of any other insufficiency, or by reason of any defect, which defect is due to the negligence of said employer, its officers, agents, servants or other employees in its cars, engines, motors, appliances, machinery, track, roadbed, boats, works, wharves or other equipment.

SECTION 2. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence

shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; provided, that no employee who may be injured or
228 killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier, its officers, agents, servants or other employees of any federal or state statute enacted for the safety of employees contributed to the injury or death of such employe.

SEC. 3. That any action brought against any common carrier, under or by virtue of any of the provisions of this act, to recover damages for injuries to, or the death of any of its employees, such employees shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier, its officers, agents, servants, or other employees of any federal or state statute enacted for the safety of employes contributed to the injury or death of such employee.

SEC. 4. That any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void; provided, that in any action brought against any common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum contributed or paid to any insurance, relief, benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

SEC. 5. That any right of action given by this act to a person suffering injury shall survive to his or her personal representatives, for the benefit of those entitled to recover under this act, but in such cases there shall be only one recovery for the same injury.
229 SEC. 6. That all acts or parts of acts so far as the same are in conflict herewith are hereby repealed.

SEC. 7. This act shall be in force and take effect from and after its publication in the statute book."

Plaintiff pleads the above and foregoing laws of the State of Kansas for the purpose of availing to himself the benefit thereof in this cause of action and bases his cause of action thereon.

Plaintiff alleges that the defendant's acts in not providing him with a safe track and in suffering and permitting another car of the defendant to run into and collide with him in the manner aforesaid is contrary to and in violation of the statutory provisions above set forth.

Plaintiff alleges that by reason of the collision aforesaid he was injured in the following manner and particulars, to-wit:

His back and spinal column were wrenched and sprained, and the ligaments, muscles and tendons in and about his back and spinal column were stretched and loosened; he suffered a fracture of two ribs upon his left side; his breast and ribs upon his life side were bruised and contused; his left shoulder blade was wrenched and displaced; his neck was wrenched and the ligaments and muscles in and about his neck and head were wrenched and loosened; he suffered a severe blow to his head, rendering him dizzy and causing him great

pain and constant headaches; his shoulders and chest were wrenched and contused, rendering difficult the movement of his said shoulders and arms; he was injured internally, the exact nature and
230 extent of which it is impossible more definitely to state; his nervous system was shocked and permanently injured; that he has lost his natural rest and sleep, and by reason of said injuries his general health has been greatly impaired; that he has suffered and will in the future suffer great pain in body and anguish of mind by reason of his said injuries; that at the time of said injury plaintiff was earning the sum of eighty-five dollars per month as motorman for defendant; that since said injury and as a result thereof he has been unable to work and earn a livelihood, and will in the future be unable to earn a livelihood by reason of said injuries; that all of said injuries so received as aforesaid are permanent and lasting in their character and effect, and were directly caused and occasioned by the negligent and careless acts and omissions of the defendant, its agents, servants and employees, as aforesaid, all to plaintiff's damage in the sum of twenty-five thousand dollars.

Wherefore, plaintiff asks judgment against said defendant for the sum of twenty-five thousand dollars and costs.

ATWOOD & HILL,
By O. S. HILL,
Attorneys for Plaintiff.

Received a copy of the above and foregoing this 17 day of August, 1912.

C. F. HUTCHINGS,
Attorney for Defendant."

Judge MOORE: Mark this.

The same was marked "6."

231 Judge MOORE: We offer in evidence the letter marked "6."

Mr. ATWOOD: We admit the signature of Mr. Harvey, but we object to it as incompetent, irrelevant and immaterial.

The objection was by the court overruled.

The said letter, marked "6," is as follows:

"Metropolitan Street Railway Company.

Julien H. Harvey, Supt. of Employment.

KANSAS CITY, MO., July 7, 1911.

Mr. J. W. Richardson, Gen. Supt. The Kansas City-Western Ry. Co., Leavenworth, Kansas.

DEAR SIR: Your letter of July 5th at hand. I do not understand why our request should be considered as putting you to any unnecessary trouble. As stated in my first letter, Mr. James requested this same information from you on Jan. 17th last, and you replied by giving him the information sought.

The reason we desire these names, is in order that we may keep

a record of your men while they are operating over our tracks, the same as if they were actually in our employ. As an authority for this request, I quote Sec. 3, of Contract, between this company, and the Kansas City-Western Ry. Co., dated June 27, 1907, which is as follows:

"That the Leavenworth Company will assume and pay all
232 the costs of trainmen's wages while they are engaged in operating these cars over the tracks of the Metropolitan Company, but such trainmen while so operating the cars of the Leavenworth Company over the tracks of the Metropolitan Company, shall be under the exclusive jurisdiction, orders and control of the Metropolitan Company, and as between said companies, shall in all respects be regarded for the time being as employees of the Metropolitan Company."

Trusting that you will see your way clear to furnish us the statement, as requested, I am,

Very truly yours,

JULIEN H. HARVEY,
Supt. of Employment."

J. H. H.-S.

This was all the evidence offered.

Thereupon the defendant demurred to the evidence and asked the court to give to the jury the following instruction:

"Under the pleadings and the evidence in this case your verdict will be for the defendant."

The court overruled the said demurrer to the evidence, and refused to give said instruction to the jury. To the ruling and action of the court in overruling said demurrer to the evidence, and in refusing to give said instruction to the jury, the said defendant then and there duly excepted.

The plaintiff asked and the court gave to the jury the following instruction:

"If the jury find the issues of fact for the plaintiff, they
233 are instructed that in estimating and determining the measure of his damages they should take into consideration in connection with all the facts and circumstances in evidence, the bodily pain and mental anguish, if any, endured by him and resulting from the injuries received; the character and extent of his injuries, if any, and whether they are permanent in their nature; the extent, if any, to which he has been prevented and disabled by reason of such injuries from working and earning a livelihood for himself; his age, situation and condition in life; and shall find for him such sum as in the judgment of the jury, under all the evidence in the case, will compensate him for the injuries received, as shown by the evidence, not however exceeding the sum of twenty-five thousand dollars."

To the ruling and action of the court in giving to the jury the said instruction so asked by the plaintiff, the defendant then and there duly excepted.

The defendant asked and the court gave to the jury the following instruction:

"If you believe from the evidence that the tracks of the defendant terminate in the State of Kansas at a point where they connect with the tracks of the Metropolitan Street Railway Company and said Metropolitan Street Railway Company, at such terminus, accepted the cars of the defendant upon the tracks of the Metropolitan Street Railway Company, and by means of its own employees operated said cars into the State of Missouri and back to said terminus, then the court instructs you that the defendant
234 was not engaged in interstate commerce, and if the plaintiff, while operating said cars from the terminus of the tracks of the Kansas City Western Railway Company in Kansas into and through Kansas City, Missouri, was the servant and employee of the Metropolitan Street Railway Company, and his wages were to be paid by it, then the court instructs you that the plaintiff was not engaged in interstate commerce as an employee of the defendant and cannot recover."

The defendant asked and the court refused to give to the jury the following instructions:

"3. The court instructs you that the operation of defendant's cars by the Metropolitan Street Railway Company under written contracts dated in the years 1904 and 1907 between the defendant, the Kansas City-Western Railway Company and the Metropolitan Street Railway Company, would not constitute engaging in interstate commerce by the defendant.

4. If you find from the evidence that on the 18th day of December, 1912, the said defendant, Kansas City-Western Railway Company, did not operate any of its cars in Kansas City, Missouri, then your verdict should be for the defendant.

5. If you find and believe from the evidence of the case there was a written contract between defendant and the Metropolitan Street Railway Company under the terms of which said Metropolitan Street Railway Company operated and controlled the cars of defendant while upon the tracks of said company in Kansas City, Kansas, and Kansas City, Mo., and if you further find that
235 on the — day of June, A. D. 1911, said Metropolitan Street Railway Company was by order of the Federal Court placed in the hands of the receivers and that thereafter said cars were run and operated substantially as before the appointment of said receivers and no notice of the cancellation of said contract was given to this defendant, then the court instructs you that said cars are presumed to have been operated according to the terms of said contract.

6. If you find from the evidence that on the 18th day of December, 1911, car No. 21 belonging to said defendant, while in the State of Missouri, was under the control and operated by the Metropolitan Street Railway Company, and not by the said defendant in this action, then your verdict should be for said defendant.

7. The court instructs you that if you find from the evidence that receivers were appointed for the Metropolitan Street Railway

Company before the time plaintiff claims to have been injured and since the appointment of such receivers they have not operated the cars of the defendant under said contracts, but have received said cars at the terminus of the defendant in Kansas without any contract or arrangement with the defendant, and have operated said cars from said terminus into and through Kansas City, Missouri, and back to the said terminus, then the court instructs you that the operation of said cars by said Metropolitan Street Railway Company did not constitute engaging in the business of interstate commerce by the defendant, and the plaintiff cannot recover.

236 8. You are instructed that a railway company may be engaged in the business of carrying passengers wholly within one state and at the same time engaged in the interstate business of carrying freight or express between different states, and even though you find from the evidence that the defendant was engaged in the business of carrying freight from points in Kansas to points in Missouri, that would not make the defendant a common carrier of passengers between the said States; and if you find from the evidence that the defendant did not operate any of its cars in the State of Missouri and that its cars when in said State of Missouri was on the tracks of the Metropolitan Street Railway Company and under the exclusive control of said Metropolitan Street Railway Company while in said State of Missouri, then your verdict should be for the defendant.

9. You are instructed that the mere fact that the Metropolitan Street Railway Company went into the hands of receivers appointed by the Federal Court would not annul or cancel a contract, if any, existing between said Metropolitan Street Railway Company and the Kansas City Western Railway Company relative to the running of the cars of the Kansas City Western Railway Company over the tracks of the Metropolitan Street Railway Company in Kansas City, Kansas, and Kansas City, Mo.

10. If you find from the evidence that said plaintiff, George B. McAdow, operated cars of defendant company over the tracks of Metropolitan Street Railway Company in Kansas City, Mis-

237 souri, and he, at such times, was subject entirely to the orders of the Metropolitan Street Railway Company, then your verdict should be for the defendant in this action."

To the action of the Court in refusing to give the said instructions, and each of the said instructions, so asked by the defendant and refused by the Court, the said defendant then and there duly excepted.

The Court, of its own motion, gave to the jury the following instructions:

"You are instructed that nine or more jurors may render a verdict in this case.

If all of you agree upon a verdict your foreman alone will sign it but if your verdict is rendered by nine, or more, and less than twelve jurors, such verdict must be signed by all of the jurors who agree to it.

Forms of Verdict.

If all of you agree upon a verdict for the plaintiff, it may be in the following form: We, the jury, find the issues for the plaintiff and do assess his damages at (here insert the amount you may find) Dollars.

—— ——, *Foreman.*

If a less number than twelve jurors render a verdict for the plaintiff, it may be in the following form: We, the undersigned jurors, find the issues for the plaintiff and do assess his damages at (here insert the amount you may find) dollars.

238 If all of you agree upon a verdict for the defendant, it may be in the following form: We, the jury find the issues for the defendant.

—— ——, *Foreman.*

If a less number than twelve jurors render a verdict for the defendant, it may be in the following form: We, the undersigned jurors, find the issues for the defendant."

To which ruling and action of the Court in giving to the jury the said instructions and each of the said instructions so given by the Court of its own motion, the said defendant then and there duly excepted.

And on the 5th day of February, 1913, at said term of said Court, the jury, after due deliberation and consideration, returned into Court the following verdict, to-wit:

"We, the jury, find the issues for the plaintiff and assess his damages at $7,500.00.

J. H. KENISON, *Foreman.*"

And on said day, the Court duly rendered judgment on the said verdict, in favor of the said plaintiff and against the said defendant, in the said sum of Seven Thousand Five Hundred Dollars ($7,500).

And afterwards, at said regular January Term, 1913, of said Court, and on the 8th day of February, 1913—the same being within four days after the said verdict and judgment, the said defendant duly filed its motions for new trial and in arrest of judgment, in said cause, in words and figures as follows, to-wit:

239 "In the Circuit Court of Jackson County, Missouri, at Kansas City.

No. 63472.

GEORGE B. MCADOW, Plaintiff,
vs.
THE KANSAS CITY-WESTERN RAILWAY COMPANY, a Corporation, Defendant.

Motion of Said Defendant for a New Trial.

Now on this 8th day of February, A. D. 1913, comes above named defendant and moves the court to set aside the verdict rendered on the 5th day of February, 1913, and judgment entered thereon in this cause and grant a new trial therein, for the following reasons:

1. The verdict is against the evidence.
2. The verdict is against the weight of the evidence.
3. The verdict is against the law under the evidence.
4. The verdict is against the law, as declared in the instructions given by the court.
5. The verdict is for the wrong party.
6. The court erred in admitting incompetent, irrelevant and immaterial evidence offered by the plaintiff.
7. The court erred in excluding competent, relevant and material evidence offered by the defendant.
8. The court erred in overruling the demurrer to the evidence offered at the close of plaintiff's case.
9. The court erred in refusing to give the instructions requested by defendant, numbered 1 to 10 inclusive.
10. The court erred in giving the instructions requested by plaintiff numbered —.

240 11. The court erred in giving instructions of its own motion numbered —.

12. The damages assessed by the jury are excessive.
13. Misconduct of attorney for said plaintiff, John H. Atwood, during the trial of said cause in the hearing and presence of the jury, by the said attorney for plaintiff (while attorney Cowherd, for defendant was reading to the jury the testimony of Charles M. Stemen, contained in the affidavit of McCabe Moore filed in said cause as a ground for a continuance of the trial of said cause), saying in substance that it was not sworn to by said Charles M. Stemen, after the said attorney for plaintiff had consented, in open court, in the assignment division thereof, on the 3rd day of February, 1913, that which was contained in said affidavit of McCabe Moore, one of the attorneys for defendant, in asking for a continuance of the trial of said cause, stating what the testimony of said Charles M. Stemen would be if present in court, should and would be considered as the testimony of said Charles M. Stemen.
14. The court on the 19th day of October, A. D. at the September

Term, 1912, of the court in the assignment division thereof, the Honorable James E. Goodrich, Judge presiding, erred in overruling the motion of said defendant filed October 3rd, 1912, to strike from the files in said cause said plaintiff's second amended petition as being a departure from law to law to which ruling of the court said defendant then and there, at the time duly excepted, and said
241 defendant was thereupon, by the court, the Honorable James E. Goodrich presiding in the assignment division thereof, given until on or before the 9th day of November, A. D. 1912, in which to present and file its term bill of exceptions, which term bill of exceptions on behalf of said defendant was allowed and signed in open court and ordered to be filed and made a part of the record in said cause, by the Honorable James E. Goodrich, presiding Judge, on the 29th day of October, A. D. 1912, and during the term at which such exceptions were taken as aforesaid, as shown by said term bill of exceptions, which was filed and made a part of the record in this cause on said 29th day of October, A. D. 1912.

COWHERD & INGRAHAM,
C. F. HUTCHINGS AND
McCABE MOORE,
Attorneys for said Defendant."

"In the Circuit Court of Jackson County, Missouri, at Kansas City.

No. 63472.

GEORGE B. MCADOW, Plaintiff,
vs.
THE KANSAS CITY-WESTERN RAILWAY COMPANY, a Corporation, Defendant.

Motion in Arrest of Judgment.

Now on this 8th day of February, A. D. 1913, comes the said defendant and moves the court to arrest the judgment in this cause for the reasons:

1. That upon the record said judgment is erroneous.
2. That the petition does not state facts sufficient to constitute a cause of action against the defendant.

242 3. The verdict of the jury is not responsive to the issues made by the pleadings.

COWHERD & INGRAHAM,
C. F. HUTCHINGS AND
McCABE MOORE,
Attorneys for said Defendant."

And afterwards, at said term of said Court, and on the 11th day of February, 1913, the defendant filed the following affidavit of H. M. Stonestreet, concerning certain testimony in said cause, to-wit:

"In the Circuit Court of Jackson County, Missouri, at Kansas City, January Term, 1913.

McADOW, Plaintiff,
vs.
KANSAS CITY-WESTERN RY. CO., Defendant.

Be it remembered that this cause coming on for trial before Hon. J. H. Slover, Judge of Division No. 6 of the Circuit Court of Jackson County, Missouri, and a jury, the following, among other proceedings were had:

Mr. COWHERD: We offer the testimony of Dr. Charles M. Stemen.

Mr. ATWOOD: I think the whole of the affidavit should be read.

Mr. COWHERD: I think the only part that is competent is the testimony of the witness.

Mr. ATWOOD: It is an affidavit for continuance, which embodies what they think the Doctor would testify.

Mr. COWHERD: It is admitted that this would be the Doctor's testimony, if present, and that is the part we offer.

243 The COURT: That is right.

Mr. ATWOOD: I don't want it to appear tha Dr. Stemen himself had sworn to that.

Mr. COWHERD: I object to that statement, and ask that the jury be discharged. We have a right to have his case tried according to the law, and that is an improper statement.

Mr. ATWOOD: The statement is withdrawn.

Mr. COWHERD: Did the court overrule my motion.

The COURT: Yes, sir. Go ahead and read the testimony.

To which action of the Court in overruling such motion to discharge the jury, the defendant then and there duly excepted.

STATE OF MISSOURI,
County of Jackson, ss:

Henry M. Stonestreet, Official Stenographer of Division No. 6 of the Circuit Court of Jackson County, Missouri—at Kansas City—being duly sworn, states that the foregoing is a true and complete transcript of the proceedings had before such court in the matter of the offer of the testimony of Dr. Charles M. Stemen, and the objections thereto, and the rulings of the court thereon, in the cause therein named.

HENRY M. STONESTREET.

Subscribed and sworn to before me, this 10th day of Feb'y, 1913. My term expires November 13th, 1913.

[SEAL.]

JOHN M. PARRY,
Notary Public, Jackson County, Mo."

244 And afterwards, at the regular March Term, 1913, of said Court, and on the 22nd day of March, 1913, the Court duly overruled said defendant's motion for new trial in said cause; to

which ruling and order of the Court the said defendant then and there duly excepted. And on said 22nd day of March, 1913, the said Court duly overruled said defendant's motion in arrest of judgment; to which ruling and order of the Court the said defendant then and there duly excepted.

And afterwards, at said term of said Court, and on the 27th day of March, 1913, the said defendant duly filed its application and affidavit for appeal in said cause, in words and figures as follows, to-wit:

"In the Circuit Court of Jackson County, Missouri, at Kansas City.

No. 63472.

GEORGE B. MCADOW, Plaintiff,
vs.
THE KANSAS CITY-WESTERN RAILWAY COMPANY, a Corporation, Defendant.

Affidavit and Application for Appeal.

STATE OF MISSOURI,
County of Jackson, ss:

McCabe Moore, of lawful age, being duly sworn on his oath, says: That the Kansas City Western Railway Company, defendant in the above entitled cause, is a corporation; that he is an attorney and agent of and for said defendant, and that he makes this affidavit for and in behalf of said defendant.

That said defendant appeals to the Kansas City Court of Appeals from the judgment rendered in and by the Circuit Court of Jackson County, Missouri, at Kansas City, in favor of plaintiff
245 in the above entitled cause and against said defendant; that such appeal is not made for vexation or delay, but because this affiant believes that said The Kansas City Western Railway Company, the appellant above named, is aggrieved by the said judgment and decision of this court, and affiant prays in behalf of said appellant that said appeal be allowed.

McCABE MOORE.

Subscribed and sworn to before me this 27 day of March, 1913.
[SEAL.] AUGUSTO C. HUMBROCK.

My commission expires February 1, 1917."

And, afterwards, at said term of said court, and on the 10th day of April, 1913, defendant duly filed its bond for appeal in said cause, which bond was by the court approved and defendant was duly granted an appeal in said cause to the Kansas City Court of Appeals; and was granted until on or before the 3rd day of June, 1913, to file its bill of exceptions herein.

And, afterwards, to-wit, on Tuesday the 27th day of May, 1913, and at the May term, 1913, of said Circuit Court, the court for good cause shown, granted and allowed said defendant, The Kansas City-Western Ry. Co., an extension of time within which to file its bill of exceptions in said cause until on or before the 3rd day of the September Term, 1913, of said Circuit Court.

And now on this 6th day of September, 1913, come parties plaintiff and defendant through their attorneys, and the said de-
246 fendant presents to the court this, its bill of exceptions herein, and it appearing that said bill of exceptions has been agreed to by the parties to the cause, plaintiff and defendant, and the same being shown to the judge to be correct—it is therefore ordered by the court that the said bill of exceptions be, and the same is hereby signed, sealed, allowed and filed and made a part of the record in this cause.

ALLEN C. SOUTHERN, [SEAL.]
Judge of the Circuit Court of Jackson County, Missouri, Division No. 6, Successor to Hon. J. H. Slover, Deceased.

Approved:

ATWOOD & HILL,
By O. S. HILL,
Attorneys for Plaintiff.

Sept. 6th, 1913.

"Filed Div. 6, Sept. 6, 1913, James B. Shoemaker, by L. B. Cameron, D. C."

247 And thereafter, to-wit, on the 8th day of December, 1913, the Court made and entered of record the following, to-wit:

GEORGE B. MCADOW, Respondent,
vs.
THE KANSAS CITY WESTERN RAILWAY COMPANY, Appellant.

Now at this day, come again the parties aforesaid, by their respective attorneys, and after arguments herein, submit this cause to the Court upon briefs.

And thereafter, to-wit, on the 2nd day of March, 1914, the same being the first day of the March Term, 1914, the Court made and entered of record the following, to-wit:

10996.

GEORGE B. MCADOW, Respondent,
vs.
THE KANSAS CITY WESTERN RAILWAY COMPANY, Appellant.

Appeal from Jackson Circuit Court.

Now at this day, come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jackson County rendered, be in all things affirmed and stand in full force and effect. It is further considered and adjudged by the Court that the said respondent recover against the said appellant costs and charges herein expended and have therefor execution. (Opinion filed.)

Which said opinion is in words and figures as follows, to-wit:

248 In the Kansas City Court of Appeals, March Term, 1914.

No. 10996.

GEORGE B. MCADOW, Respondent,
vs.
KANSAS CITY WESTERN RAILWAY COMPANY, Appellant.

Appeal from Jackson Circuit Court.

Defendant is a corporation and, as plaintiff charges, is maintaining and running a line of cars between Kansas City in the State of Missouri and Leavenworth in the State of Kansas, which cars are propelled by electricity and are known as electric cars. Plaintiff was motorman engaged in operating one of the passenger cars and was injured in a collision with another car coming in an opposite direction to that in which plaintiff was going. He brought this action for damages, charging that defendant was negligent in giving such orders as caused the cars to meet at full speed. He recovered judgment in the trial court.

An important preliminary question, regardless of the merits, has been presented for determination. The original petition appears to be an ordinary common law action. It is alleged therein that defendant was "a common carrier of passengers for hire, owning, operating and maintaining a line of electric railway extending from Leavenworth, Kansas, in a southeasterly direction through the town of Wolcott Kansas south into and through Kansas City, Kansas and into Kansas City, Jackson County, Missouri." It was also alleged in that petition that on the 18th of December, 1911, plaintiff "was operating a car belonging to defendant known as passenger

car No. 21, running in a northerly direction between Kansas
249 City, Kansas, and Leavenworth, Kansas," when the collision occurred.

Afterwards plaintiff filed an amended petition, in which he alleges that his cause of action accrued in the State of Kansas and that it was founded upon the statute of that State which is duly pleaded. Defendant moved to strike out this amended petition on the ground that it was a departure from the original. But before a ruling was had he asked and obtained leave to file a second amended petition, in which he alleged that defendant was an interstate railroad and based his cause of action on the law of Congress known as "An act relating to the liability of Common Carriers by Railroads to their Employees in certain cases," commonly known as "The Employers' Liability Act." Defendant then filed a motion to strike out this petition on the ground that it was a departure from the original and from the first amended petition. This motion was overruled and defendant took and preserved its exception to the ruling.

Afterward defendant filed its answer to the last petition consisting of a general denial, a plea of contributory negligence and the departure, and the cause was tried with the result as stated above.

Defendant now insists that plaintiff's first amended petition was a departure from law to law, that is, from the common law in the original to the statute of Kansas, in the amendment. And again a departure from law to law, in that the second amendment was an abandonment of the causes of action as alleged in the two, preceding petitions.

We will concede the departure as claimed by defendant and that ordinarily it would be a fatal error to allow plaintiff to recover judgment on a cause of action different from that originally set up. But under the rules of practice and pleadings in this State, defendant waived the objection by answering to the merits of the action finally pleaded and going to trial thereon; Scovill vs. Glasner, 79
250 Mo. 449; Liese vs. Meyer, 143 Mo. 547, 559; Dakan vs. Chase Mercantile Co. 197 Mo. 238, 270; Cook vs. Globe Printing Co. 227 Mo. 471, 525.

That such objection may be waived and a proper trial be had and a valid judgment be rendered would appear to be clear. The court had jurisdiction of the action as finally alleged and the parties appeared. If the defendant had made no objection to the second amended petition, or, if making objection, had not taken any exception to the court's ruling, as by the rules of practice it is required to do, such course would certainly have been a waiver of any error in that respect. And, under the rules of practice and pleading in this State, defendant, in effect, did that.

But, defendant insists that the judgment rendered was obtained under the provision of the law of Congress and that the decision of the Supreme Court of the United States, and not the State court, must be regarded in determining the question. We grant this, and our opinion that in matters of pleading and practice, the rule applied in the State court where the trial is had controls, is founded on decisions of that court. Thus Brinkmeir vs. Railway Co. 224 U. S.

268 was a case originating and tried in the courts of Kansas. It was appealed from the Supreme Court of that State to the Supreme Court of the United States. There the action was originally brought under the general law, and after pending some time, the plaintiff asked leave to amend so as to state a cause of action under the federal Liability Act. But in the meantime, the statute of limitations under that act having run against the action, the leave was refused. This ruling was sustained by the Supreme Court of that State, 81 Kansas 101; and on appeal the Supreme Court of the United States said this: "The plaintiff sought to amend his petition by charging that the cars were used in moving interstate traffic, but the ap-
251 plication was denied, the period of limitation having expired in the meantime. Error is assigned upon this ruling; but as it involved only a question of pleading and practice under the laws of the State, it is not subject to review by us."

Defendant relies upon Union Pac.Ry. Co. vs. Wyler, 158 U. S. 285. That case though begun in a State court, was removed to the federal court and there tried. The case is not authority for defendant. The question here was not there involved or suggested. It was there decided that an amended petition setting up a cause of action on a statute was a departure from an original petition founded on the common law. That the two causes of action were different; and though the first was within the period of the statute of limitations, if the statute had run as to the second before the amendment was made, the amendment could not be tacked to the original and the second was barred. The fact that the amendment "was wholly different," (that is, a departure) from the original was pleaded in the answer in that case (p. 287) and it is in no way applicable to the matter we are now considering; except that it does announce the rule contended for by plaintiff, that a question of departure is one of pleading (p. 296) and we think it to be inferred from what is there said, that it will be governed by the State law. The point is ruled against defendant.

We proceed to consider the case on the amended petition free of the objection we have just discussed. We will not attempt to state the evidence of defendant's negligence in detail, suffice it to say, that plaintiff on the morning of the day he was hurt was ordered by defendant's proper officer "to go to Missouri" from where he was in Kansas when he received the order. The order meant for him to take his car over the street car tracks of the Metropolitan Street Railway Company, with which defendant had a traffic arrangement, across the State line into Missouri and up into the business
252 section of Kansas City, Missouri and 10th and Main Streets and there loop back across the State line again into Kansas and thence on to Leavenworth, Kansas, a distance of near twenty-five miles. Plaintiff obeyed this order and after passengers were received, at 10th and Main streets, he proceeded back over the street railway tracks across the State line into Kansas City, Kansas. There he received an order from defendant to "Meet one car at Grandview and report at Bethel" which latter place was about four miles further on. At Bethel plaintiff received this further order from defendant:

"Come to Wolcott and come as quick as you can." It was a foggy morning and shortly before reaching Wolcott and while going at a rapid rate of speed, he collided with a passenger car coming in an opposite direction and bound for Kansas City. The evidence tended to show that plaintiff had a right to expect a clear track and that the other car should not have left Wolcott until his car arrived there. There was no substantial evidence of contributory negligence on plaintiff's part and no issue of that character was submitted to the jury.

The instructions offered by defendant and refused by the court were drawn upon the idea that the traffic contract between it and the Metropolitan Street Railway Company whereby its cars ran over the tracks of the latter company across the State line into Missouri did not constitute it a carrier of interstate commerce. So it is said that the evidence as to the contract between defendant and the street car company failed to show it was an interstate carrier.

While the traffic contract states that the Street Car company received defendant's cars at a point across the State line in Kansas and transported them over its tracks into Kansas City Missouri and then back to the point of receiving them and there delivered them to the defendant; yet, in point of fact, the only connection the street car company had was in furnishing the electric power and
253 and in placing one of its conductors in charge of the car at the point in Kansas connecting the tracks of the two companies, who remained with it for the purpose of collecting 5 cent fare from each passenger from that point into Kansas City, Missouri, and a like sum from the latter place back to the point of connection. We find from evidence, practically undisputed, that defendant's motormen ran the cars over the street car tracks into Missouri and back again. That such servants were employed and discharged by defendant and were under its orders and were paid by it. That passengers were received hourly in Missouri for points in Kansas and in Kansas for Kansas City, Missouri. The traffic arrangement contract stated and adjusted the compensation to be paid the street car company, and provision was made therein for protection and imbursement of the street car company for any negligence of defendant's servants in operating its cars over its tracks. The evidence shows that defendant ran its cars on its schedule and time table between the northern terminus at Leavenworth, Kansas, and the southern terminus at Kansas City, Missouri. Passengers for Kansas points boarded its cars at Kansas City, Missouri, and while conductors were changed at the State line, its motormen took the cars from Kansas City under its orders and on its time table, to the northern terminus. And passengers for Kansas City, Missouri, boarded its cars at Leavenworth, Kansas, and were taken by its motormen to Missouri, a change of conductors again occurring near the State line. We consider these facts left no doubt that defendant was engaged in interstate commerce and the court was justified in refusing its instructions.

But objections were made to parts of the evidence which has afforded us the foundation for the foregoing observations. The

254 principal of these related to the court admitting the evidence of Egan who was president of the Metropolitan Street Railway. As has been already stated, that road had a traffic arrangement with defendant, whereby it got its cars into and out of Kansas City, Missouri, which purported to be evidenced by a written agreement. After the agreement was made the street railway company was placed in the hands of receivers, and it was after the receivership that plaintiff was injured. Egan was president of the company for a time before the receivership as well as afterwards. He was asked if he hired plaintiff as motorman and he said no. He also testified that the street railway did not own defendant's cars. After having Egan state that the traffic arrangement between the two companies was in writing defendant objected to these statements and also moved to strike them out. The trial court overruled the objections and refused the motion.

Afterwards defendant offered this written agreement as well as a "written modification" of it, and they were admitted by the court. These instruments practically verify all that was said orally by Egan. From them it appears that "Whereas the parties hereto deem it to be to the- mutual advantage that the suburban cars of the Leavenworth company (defendant) shall be taken, moved and transported over the tracks of the party of the second part (street railway) * * * from point of present intersection in Kansas City, Kansas." In section 3 of the agreement it is provided that defendant shall deliver its cars to the street railway to be transported to Kansas City, Missouri. Section 5 recites that the street railway "agrees to operate" the defendant's cars over the route designated, into Missouri. Section 6 provides that each shall be liable for the negligence committed by its agents and servants in running the cars of the defendant over the street car tracks. Section 7 provides for a division of the 5 cent fare per passenger collected by the street railway. Section 8 provides that local street rail-

255 way passengers shall be allowed to ride on defendant's cars except when defendant's passengers are occupying all the seats. Section 15 provides for a change in point of connection of the two companies if it appears that "the cars of the Leavenworth company (defendant) can be operated more safely and expeditiously and thus more perfectly serve their patrons." Said section further provides that "In view of the necessity on the part of the Leavenworth company (defendant) making as quick time as possible between the cities of Leavenworth, Kansas, and Kansas City, Missouri, using the tracks of the Metropolitan Company (street railway) as herein provided for, it is further agreed" that in certain contingencies there may be a change of route over the street railway.

Afterwards a certain Viaduct and Terminal Company constructed a viaduct over certain lowlands and railway tracks between Kansas City, Kansas, and Kansas City, Missouri, over which the street railway company begun to operate its cars and the defendant concluding it could get into Kansas City, Missouri, more directly by this route, entered into the modified agreement spoken of above,

whereby it agreed to bear one half the expense with the street railway company for "curves tracks and special works necessary to enable its cars to be turned from such tracks," etc. Section 3 provides that defendant "shall pay all trainsmen wages while they are engaged in operating its cars" on the street railway track, but that such men shall be under the orders of the latter company. "And, as between said companies, shall in all respects be regarded for the time being as the employees of the street railway company."

Now we are unable to see how defendant could have been harmed by the oral evidence of Egan that he did not hire or pay the motormen who operate defendant's cars over the street railway tracks. That fact is made manifest from the face of the written agreement.

256 The last provision above referred to makes this quite plain.

But if the written contracts did provide, on their face, that the street railway company should take defendant's cars and operate them exclusively, with its own servants, we do not see any reason why that should prevent the fact from being shown, if it were a fact, that, notwithstanding the writing, the defendant operated them with its own servants, or at least with its own motorman. Written contracts cannot be utilized to prevent evidence that they were not observed.

Defendant further insists that since the Metropolitan Company was a street railway, it was not a railroad, within the meaning of that word as used in the Act of Congress. An interurban trolley, or electric system of railway, running through more than one State carrying passengers, or freight, or both, is undoubtedly engaged in interstate commerce, and is a railroad within the meaning of the Act of Congress. Now whether a street railway, is a railroad in the ordinary acceptation of that term is a question which has received opposing answers. It was held not to be a railroad in Missouri; Sams vs. Ry. Co. 174 Mo. 53. And in Omaha Street Ry. vs. Int. Com. Comm. 230 U. S. 324, it was held that it was not a railroad within the meaning of the Act of Congress.

But that case is so unlike this as to be of little service. The facts which we have recited justify us in stating the question here to be this: Is an electric in-erurban railway line which transfers its cars with passengers therein, from its track to the track of a street railway and thence transports them over the latter track from one State into another State, dividing the fare collected for that part of the transportation covering the street railway tracks, a railroad engaged in interstate commerce within the meaning of the Act of Congress? In our opinion it is. The use of the street railway tracks, in the transportation of passengers in its cars from Kansas into

257 Missouri and from Missouri into Kansas was no more than the use of a terminal facility by defendant. It is common knowledge that railroads have terminal facilities for entrance into cities which they obtain by various modes from other corporations, or persons, at an agreed compensation. The mode of operating such facility and collecting the compensation cannot divest the railroad of its character, so long as the business is the business of such road and conducted by it.

Our conclusion is that the judgment should be affirmed. All concur.

JAMES ELLISON, *P. J.*

258 And thereafter, to-wit, on the 11th day of March, 1914, there was filed in the office of the Clerk of the Kansas City Court of Appeals an Assignment of Errors, which is hereto attached:

259 UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States.

In the Kansas City Court of Appeals (in the State of Missouri).

No. —.

THE KANSAS CITY WESTERN RAILWAY COMPANY (Appellant), Plaintiff in Error,

vs.

GEORGE B. MCADOW (Respondent), Defendant in Error.

Assignment of Errors by Plaintiff in Error.

Now comes the Kansas City Western Railway Company, Respondent in the Kansas City Court of Appeals of Missouri, and Plaintiff in Error in a writ of error to the Kansas City Court of Appeals of Missouri from the Supreme Court of the United States, duly allowed, in the above entitled cause of George B. McAdow, Respondent and Defendant in Error, against the Kansas City Western Railway Company, Appellant in said Kansas City Court of Appeals of Missouri and Plaintiff in Error in said writ of Error in the Supreme Court of the United States in said cause, and upon a judgment in the Kansas City Court of Appeals of Missouri at the March Term thereof A. D. 1914, and on the 2nd. day of March A. D. 1914, in the above-entitled cause, the said Kansas City Western Railway Company, Plaintiff and Respondent in the Kansas City Court of Appeals of Missouri, and Plaintiff in Error in said writ of Error returnable *with* the Supreme Court of the United States according to law, does say, by its attorneys and counsel in this behalf, that: In the record and proceedings in said cause there is manifest error to its prejudice upon the merits of said cause, and they assign error in said record and proceedings to this court, to-wit:

I. The said Kansas City Court of Appeals as shown by its opinion erred in its construction of the Federal Employers' Liability Act of 1908 (35 U. S. Statute- at Large, 65 Chap. 149) and the amendment thereto approved April 5th, 1910, as applicable to the facts and pleadings disclosed by the record in this cause, or as affording

260 any basis of recovery in behalf of said George B. McAdow.

II. The said Kansas City Court of Appeals erred in not reversing the judgment of the trial court, to-wit: the circuit court of Jackson in the State of Missouri.

III. The said Kansas City Court of Appeals erred in deciding and holding that the operating of the cars of said plaintiff in Error under the written traffic agreements between the Metropolitan Street Railway Company and said plaintiff in Error, whereby the said cars of the said plaintiff in Error were operated over the tracks of said street Railway across the State line into the state of Missouri constituted and made said plaintiff in Error a common carrier of interstate commerce by railroad within the purview and contemplation of the Act of Congress of the United States of America, known as The Federal Employers' Liability Act of 1908 (35 U. S. Stat. at Large 65 Chap. 149) entitled "An Act Relating to the liability of common carriers by railroad to their employees in certain cases," approved April 22nd. 1908 and the Amendment thereto approved April 5th. A. D. 1910.

IV. The said Kansas City Court of Appeals erred to the prejudice and against the rights of said plaintiff in Error, in deciding and holding that, under all of the evidence introduced in the trial of said cause, and the statutes and laws of the United States, Known as The Federal Employers' Liability Act of 1908 and the amendment thereto approved the 5th. day of April A. D. 1910 the said George B. McAdow defendant in Error was entitled to judgment against said plaintiff in Error.

V. That the said Kansas City Court of Appeals, erred, as shown by the undisputed facts in the record, in holding that there was any legal evidence offered at the trial either proving, or tending to prove, that said plaintiff in Error, was a "common carrier by railroad" and engaged in commerce between the states of Kansas and Missouri, within the contemplation and purview of the statutes of the
261 United States known as the Federal Employers' Liability Act of 1908 and the Amendment thereto of April 1910, as it was a conceded fact, alleged in the petition of defendant in Error, that the cars of plaintiff in Error when in the state of Missouri were operated only "on the tracks of the Metropolitan Street railway" and that the passengers in said cars paid their fares of 5 cents each, to the conductor of said street railway company, which entitled them to transfers to all cars of said Metropolitan Street Railway Company and to any and all lines of said street railway company in Kansas City, Kansas and Kansas City, Missouri with the same right and privilege as any passenger boarding any other car of said Metropolitan Street Railway Company and therefore were not interstate passengers "by railroad" "which congress had in mind" when it enacted said federal statutes "which in terms applies to carriers engaged in the transportation of passengers or property by railroad" and not by street railroads for "when street railroads carry passengers across a state line, they are of course, engaged in interstate commerce, but not the commerce which congress had in mind."

VI. That said Kansas City Court of Appeals erred in sustaining the trial court in its refusal to give to the jury instruction No. 3 requested by plaintiff in error which instruction read as follows:

"The court instructs you that the operation of defendant's cars by the Metropolitan Street Railway Company under the written con-

tracts dated in the years 1904 and 1907 between the defendant, the Kansas City Western Railway Company and the Metropolitan Street Railway Company, would not constitute engaging in interstate commerce by the defendant."

The refusal of the trial court to give said instruction and the sustaining of the trial court in such refusal by the said Kansas City Court of Appeals was error, prejudicial to the rights of plaintiff in error because of so ignoring said written contracts referred to in said requested instruction the question of law, to-wit: whether or
262 not plaintiff in error was an interstate common carrier by railroad within the purview of the Federal Employers' Liability Act of 1908, was left for the determination of the jury, without a proper consideration of said written contracts.

VII. That said Kansas City Court of Appeals erred in sustaining the trial court in said trial court's refusal to give to the jury instruction No. 5 requested by said plaintiff in error which instruction read as follows:

"5. If you find and believe from the evidence of the case there was a written contract between defendant and the Metropolitan Street Railway Company under the terms of which said Metropolitan Street Railway Company operated and controlled the cars of defendant while upon the tracks of said company in Kansas City, Kansas, and Kansas City, Mo., and if you further find that on the — day of June A. D. 1911, said Metropolitan Street Railway Company was by order of the Federal Court placed in the hands of the receivers and that thereafter said cars were run and operated substantially as before the appointment of said receivers and no notice of the cancellation of said contract was given to this defendant, then the court instructs you that said cars are presumed to have been operated according to the terms of said contract."

The refusal of the trial court to give said requested instruction and the sustaining of the trial court in such refusal by said Kansas City Court of Appeals was and is in error, prejudicial to the rights of plaintiff in error, because the undisputed evidence was that in June A. D. 1911, said Metropolitan Street Railway Company was by order of the Federal Court placed in the hands of receivers and there was ample evidence on which the jury could have found that the cars of plaintiff in error were run and operated on the tracks of said street railway company in Kansas City, Kansas and in Kansas City, Mo., substantially as before the appointment of said receivers, and there was no evidence that any notice of a cancellation of said contract was given to plaintiff in error consequently said cars were presumed to have been operated according to the terms of said written contract and the jury should have been so instructed as requested by plaintiff in error.

VIII. That said Kansas City Court of Appeals erred in sustaining the trial court in its refusal to give to the jury instruction No. 7 requested by plaintiff in error which read as follows:

"7. The court instructs you that if you find from the evidence that receivers were appointed for the Metropolitan Street Railway

Company before the time plaintiff claims to have been injured
263 and since the appointment of such receivers they have not operated the cars of the defendant under said contracts, but have received said cars at the terminus of the defendant in Kansas without any contract or arrangement with the defendant, and have operated said cars from said terminus into and through Kansas City, Missouri, and back to the said terminus, then the court instructs you that the operation of said cars by said Metropolitan Street Railway Company did not constitute engaging in the business of interstate commerce by the defendant, and the plaintiff cannot recover."

The refusal of the trial court to give said requested instruction and the sustaining of the trial court in such refusal by said Kansas City court of appeals was error prejudicial to the rights of plaintiff in error, because if the said receivers of said street railway did operate said cars of plaintiff in error on the tracks of said street railway, and not under any contract or arrangement with plaintiff in error, from the terminus of the tracks of plaintiff in error, two miles west of the state into Missouri on said Metropolitan Street Railway tracks and back to the said terminus of the tracks of plaintiff in error, then said plaintiff in error would not be engaged in the business of interstate commerce either by railroad, by street railroad or in any other manner, and the jury should have been instructed if they found such a state of facts from the evidence that plaintiff in error was not liable in said action.

IX. That said Kansas City Court of Appeals erred in construing the terms and provisions of the written traffic contract entered into between the Metropolitan Street Railway Company and plaintiff in error, as shown by its opinion, in referring to said written contract wherein said court of appeals says: "and provision was made therein for the protection and imbursement of the Street car Company for any negligence of defendant's servants in operating its cars over its tracks."

Said written contract did not and does not contain any such provision.

There is no provision in said contract for the protection and imbursement of the street car company for any negligence of defend-
ant's (plaintiff in Errors) servants in operating its cars over
264 the tracks of the street railway company; but, on the contrary, there is a provision in the contract (Sec. 6 of the contract dated July 16, 1904) for the protection and imbursement of Plaintiff in error for any negligence of the agents or servants of the Metropolitan Street Railway Company in operation of said cars."

Said plaintiff in error (under the provisions of said contract was only liable for its own negligence such as delivering to said street railway company for the negligence of any servant in operating said cars over the Metropolitan tracks.

The modification of said contract dated June 27, 1907 expressly provided (Sec. 3) that the "trainmen while so operating the cars of the Leavenworth company over the tracks of the Metropolitan company shall be under the exclusive jurisdiction, orders and control of the Metropolitan company, and as between said companies, shall in

all respects be regarded for the time being as the employees of the Metropolitan Company."

The said Kansas City Court of Appeals was therefore in error when it declared and decided that plaintiff in error was liable for the negligence of its "servants in operating its cars" over the tracks of the Metropolitan Street railway company.

Said Street railway was not protected by any provision of said contract or imbursed for any negligence of the servants of plaintiff in error in operating its cars on the tracks of said Street railway, for it was expressly provided that such servants as operated said cars on said tracks should be considered "employees of the Metropolitan Company."

Plaintiff in error was not liable to said Metropolitan Street Railway Company for the negligence of the employees or servants operating said cars, for said contract provided that such servants were not servants of plaintiff in error.

Such misconstruction by said court of appeals as to the
265 terms of said contract was prejudicial error because, if the employees operating said cars were in law the employees of the Metropolitan Street Railway Company alone, then plaintiff in error, was not engaged in the operation of said cars and was not within the purview of said Federal Employers' Liability Act of 1908 or the amendment thereto of 1910, upon which the alleged cause of action of defendant in error was solely based.

X. That the said Kansas City Court of Appeals, erred in construing Sec. 6 of said written contract dated July 16, 1904, as shown by the opinion of said court wherein it says: Section 6 provides that each shall be liable for the negligence committed by its agents and servants in running the cars of the defendant over the street car tracks."

Such a construction of said Section 6 by said court of appeals is erroneous and prejudicial to the rights of plaintiff in error, because by the terms of said Section 6, and the contract of which it was a part, the trainmen who operated cars of plaintiff in error when on the tracks of the street railway company were under "the exclusive jurisdiction and control" of the street railway company and "in all respects" were "employees of the Metropolitan company" (Sec. 3 contract of July 27, 1907) and because by the express provisions of said Section 6 the Street Railway Company was made liable for any negligence of "its agents or servants in the running of said cars" on the tracks of said street railway company, as such servants were the servants of said Street railway company and plaintiff in error was liable only for its own negligence to said Metropolitan Street Railway Company such as by delivering to the Metropolitan Street Railway Company a defective car which was to be operated by said Metropolitan Street Railway Company.

Such misconstruction by said court of appeals as to the terms of
266 said contract was prejudicial error because, if the employees operating said cars were in law the employees of the Metropolitan Street Railway Company alone, then plaintiff in error, was not engaged in the operation of said cars and was not

within the purview of said Federal Employers' Liability Act of 1908 or the amendment thereto of 1910, upon which the alleged cause of action of defendant in error was solely based.

XI. That the said Kansas City Court of Appeals erred to the prejudice and against the rights of plaintiff in Error in holding and deciding that "the use of the street railway tracks in the transportation of passengers in its cars from Kansas into Missouri and from Missouri into Kansas was no more than the use of a terminal facility by defendant" the plaintiff in error herein and in deciding that: "an interurban trolley, or electric system of railway, running through more than one state carrying passengers, or freight or both, is undoubtedly engaged in interstate commerce, and is a railroad within the meaning of the act of Congress."

XII. That the said Kansas City Court of Appeals erred to the prejudice and against the rights of plaintiff in error, in sustaining the trial court in overruling the motion of plaintiff in error, filed October 3rd, 1912, to strike from the files said defendant in error's second amended petition, filed the 25th day of September A. D. 1912, as being a departure from law to law, and as alleging a new and different cause of action from that alleged in said original petition of defendant in error, and a further and different cause of action from that alleged in the amended petition of said defendant in error filed August 16th A. D. 1912, and said Kansas City Court of Appeals erred to the prejudice of the said plaintiff in error by holding and deciding that plaintiff in error waived the objection to such departure "by answering to the merits of the action finally pleaded and going to trial thereon."

Said plaintiff in error did not waive its objection to said departure by pleading to the merits of the action pleaded in the 2nd.
267 amended petition of said defendant in error, 1, because said plaintiff did not plead to the merits of said second amended petition in the first instance but, on the contrary, filed a motion to strike said second amended petition from the files in said cause, and did not plead to the merits of said second amended petition until after its said motion to strike said second amended petition was overruled and excepted to; 2nd, because said plaintiff in error did not plead to the merits of said second amended petition until it was compelled to do so, or allow a judgment to be rendered against it in the sum of $25,000, which was the amount prayed for in said second amended petition of defendant in error; 3rd, because when said plaintiff in error pleaded to the merits of said second amended petition, it did so by filing an answer to said second amended petition in which answer said departure was expressly pleaded as a defense in said action by alleging that said defendant in error was not entitled to maintain said action and should not recover anything under his said second amended petition, which is based solely on the Federal Employers' Liability Act of 1908 and the amendment thereto of 1910, "because said second amended petition constitutes and is a departure from law to law and alleges a different and further cause of action from that alleged in his original petition in this cause, which was based on a common law action, and also al-

leges a different and further cause of action from that alleged in his first amended petition in this cause, which was based on a statute of the State of Kansas"; 4th. because the objection to the erroneous ruling of the trial court on the said question of departure was not waived by plaintiff in error on account of not submitting "to further proceedings without protestation," as "It is only where there is a plea to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived," and said plaintiff in error, under the undisputed facts, disclosed
268 by the record urged its objection to said departure at the earliest opportunity by motion and continued to do so by asserting such objection afterwards in its answer and again in its motion for a new trial; 5th. because by the terms and provisions of said amendment of 1910 an action to enforce a liability thereunder can only be brought in a court in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of the commencing of such action; that this action having been originally based upon a cause of action at common law was brought in a court in which plaintiff in error could be sued in a common law action but in which it could not be sued in an action based solely upon said Federal Statutes, and by the departure by amending said common law action to one based solely upon said Federal Employers' Liability Act of 1908 as amended by the Act of 1910, the plaintiff in error was compelled to submit to the jurisdiction of a court in which an action for liability under said Federal statutes could not have been originally brought; that the record affirmatively shows that plaintiff in error was a corporation organized under the laws of the state of Kansas; that the cause of action, if any, arose in the state of Kansas, and there is no evidence or matter in the record showing that plaintiff in error was doing business at the time of commencing such action in the district or state of Missouri; that the provisions of said amendment of 1910 to said Federal Employers' Liability Act of 1908 fixing the venue and prescribing the court in which such actions should be brought is an essential part of said Federal statutes and the decision of said trial court and of said Kansas City Court of Appeals that a common law action against plaintiff in error could be changed by amendment to an action based solely upon said Federal statutes and that such departure was waived by plaintiff in error, although objected and excepted to and such objection inserted in and made a part of its answer, was in violation of said amendment of 1910 to said Federal statute of 1908, and in violation of
269 that portion of the 14th amendment to the *court* of the United States, which reads as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

XIII. The said Kansas City Court of Appeals erred to the prejudice of plaintiff in error in holding and deciding that plaintiff in

error waved the departure in pleading arising from the changing of a common law action to one based solely on said Federal Statute of 1908 and the amendment thereto of 1910, although the plaintiff in error objected and excepted to such change and departure and inserted such objection in its answer because by such change and departure the plaintiff in error was compelled to submit to the jurisdiction of a court not authorized to entertain an action under said statutes against plaintiff in error and because said plaintiff in error was thereby deprived of its property without due process of law.

XIV. That the said Kansas City Court of Appeals erred to the prejudice, and against the rights of said plaintiff in error, in deciding and holding that the question of a departure is governed, in this case by the State law of Missouri, because in this case, the said question of departure involves the construction and effect of the statutes of the United States, known as the Federal Employers' Liability Act of 1908 and the amendment thereto of A. D. 1910 on which the cause of action alleged in the second amended petition of defendant in error is solely based, which said statutes should have "a uniform construction" and the same meaning and effect in all the states of the Union."

For the foregoing prejudicial errors, and each of them, consisting in the denial of rights and immunities expressly claimed by plaintiff in error, under the Federal Employers' Liability Act of 1908, and the amendment thereto of 1910, said plaintiff in error
270 prays a reversal of the judgment of the circuit court of Jackson County, and the judgment of affirmance thereof by said Kansas City Court of Appeals of Missouri, and further prays that the judgment aforesaid, for each of the errors aforesaid and for other errors in the record and proceedings in said cause, whereby the said plaintiff in error has been by said judgment deprived of its rights, privileges and immunities, and for each of the errors and matters above assigned, be reversed, annulled and held for naught; and that the said plaintiff in error may be restored to all things which it has lost by reason of said judgment of said Kansas City Court of Appeals of Missouri and by the judgment of the said Circuit court of Jackson County, Missouri affirmed thereby.

Dated March 11th 1914.

THE KANSAS CITY WESTERN RAILWAY COMPANY, *Plaintiff in Error,*
By CHARLES F. HUTCHINGS AND McCABE MOORE,
Its Attorneys of Record.

Filed Mar. 11, 1914. L. F. McCoy, Clerk.

271 And thereafter, on the same date, to-wit, the 11th day of March, 1914, was filed a petition for writ of error, which is hereto attached as follows:

272 UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States.

In the Kansas City Court of Appeals of the State of Missouri.

No. —.

THE KANSAS CITY WESTERN RAILWAY COMPANY (Appellant),
Plaintiff in Error,
vs.
GEORGE B. MCADOW (Respondent), Defendant in Error.

Petition for Writ of Error.

To the Honorable the Justices of the Supreme Court of the United States, or to any of the Associate Justices thereof, or to the Presiding Judge of the Kansas City Court of Appeals of the State of Missouri:

Now comes the above named appellant in the Kansas City Court of Appeals of the State of Missouri by its attorneys, and complains: That in the record and proceedings had in said cause of George B. McAdow, Respondent vs. Kansas City Western Railway Company, Appellant, No. 10996, in the Kansas City Court of Appeals of Missouri, and also in the rendition of the judgment in said cause, in the Circuit Court of Jackson County, Missouri, as shown by the record in said cause, manifest error has happened, to the great damage of said Kansas City Western Railway Company, the defendant therein and appellant in said Kansas City Court of Appeals of Missouri; that said error in the judgments of each and both of said state courts consisted in the denial of rights and immunities expressly claimed by said Kansas City Western Railway Company, under the Federal Employers' Liability Act of 1908 (35 U. S. Statutes at Large, p. 65, Chapter 149) and the amendment thereto of A. D. 1910, and in the affirmance of alleged rights and immunities claimed by said George B. McAdow, under said federal statutes, which said alleged rights and immunities were controverted by said Kansas City Western Railway Company; that under and by virtue of the records and proceedings in the state courts aforesaid, the proper construction of each of said federal statutes was in-
273 volved, and the right of said George B. McAdow to recover in said cause was based solely upon said federal statute of 1908 and the amendment thereto of 1910; that the judgments of said state courts were based solely upon the Federal acts aforesaid, and each of said acts was erroneously construed by each of said state courts adversely to the contention of said Kansas City Western Railway Company; and that said Kansas City Court of Appeals of Missouri, in whose record and judgment the aforesaid errors appear, is the highest court of law or equity in the State of Missouri in which a decision could be had in said suit between the parties thereto aforesaid.

Wherefore, said Appellant, the Kansas City Western Railway Company, by its attorneys, prays for the allowance of a writ of Error from the Supreme Court of the United States to the said Kansas City Court of Appeals of Missouri, and for an order fixing the amount of bond for supersedeas in said cause, and to approve said bond, and for such other orders and proceedings as may cause the manifest errors in said cause to be corrected by the said Supreme Court of the United States of America.

Dated this 11th day of March, A. D. 1914.

KANSAS CITY WESTERN RAILWAY COMPANY,
Appellant and Plaintiff in Error,
By CHARLES F. HUTCHINGS AND McCABE MOORE,
Its Attorneys of Record.

Filed Mar. 11, 1914. L. F. McCoy, Clerk.

274 And on said date there was filed in the office of the Clerk of the Kansas City Court of Appeals a Writ of Error from the Supreme Court of the United States and an order allowing same by the Presiding Judge of the Kansas City Court of Appeals, and which is attached hereto as follows; to-wit:

275 In the Supreme Court of the United States.

KANSAS CITY WESTERN RAILWAY COMPANY (Appellant), Plaintiff in Error,
vs.
GEORGE B. McADOW (Respondent), Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA,
Western District of Missouri, Western Division:

The President of the United States to the Honorable the Judges of the Kansas City Court of Appeals of Missouri:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Kansas City Court of Appeals, before you or some of your, being the highest court of law or Equity of the said State of Missouri in which a decision could be had in the suit between the Kansas City Western Railway Company, Appellant, and George B. McAdow, Respondent, wherein was drawn in question the construction of the statutes of the United States, Known as the Federal Employers' Liability Act of A. D. 1908, (35 U. S. Statutes at Large, p. 65, Chapter 149), and the Amendment thereto of 1910, as applicable to and bearing upon the assessment of damages against the said Kansas City Western Railway Company for injuries received by and occurring to said George B. McAdow,

on the 18th., day of December 1911, and the decision was against the right, privilege, or exemptions specifically set up or claimed by said Plaintiff in Error under the statutes aforesaid, a manifest error hath happened to the great damage of the said Kansas City Western Railway Company, the plaintiff in Error, as by its complaint appears, we being willing that error, if any, hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings of record with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the City of Washington, in the
276 District of Columbia, thirty days after the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 11th day of March in the year of our Lord 1914, and of the Independence of the United States of America, the one hundred and thirty-eighth.

[Seal of the United States District Court, Western District of Missouri, Western Division.]

JOHN B. WARNER,
Clerk of the District Court of the United States for the Western District of Missouri, Western Division, at Kansas City, Missouri,
By C. J. MURRAY,
Deputy Clerk.

Allowed this 11th day of March A. D. 1914, by

JAMES ELLISON,
Presiding Judge of the Kansas City Court of Appeals of Missouri.

Filed Mar. 11, 1914. L. F. McCoy, clerk.

277 And on said date there was also filed in the office of the Clerk of said Kansas City Court of Appeals an order of the Presiding Judge of said court approving said bond, as a supersedeas and granting said Writ of Error, which order is in words and figures as follows, to-wit:

278 In the Kansas City Court of Appeals of Missouri, March Term, A. D. 1914.

GEORGE B. MCADOW, Respondent,
vs.
KANSAS CITY WESTERN RAILWAY COMPANY, Appellant.

Order on Petition for Writ of Error.

Now on this 11th day of March A. D. 1914, there is presented to the Honorable James Ellison, Presiding Judge of the Kansas City Court of Appeals, of Missouri, a petition for a writ of error to the Supreme Court of the United States, a writ of error to the Supreme Court of the United States, a citation directed to said George B. McAdow, Respondent, citing and admonishing him to appear in the Supreme Court of the United States not exceeding thirty days from and after the day said citation bears date, and an assignment of errors; which said petition for a writ of error is allowed, which said writ of errors is allowed, said citation signed, said assignment of errors filed, and an order of said Presiding Judge filed approving the writ of error bond in the sum of One Thousand Dollars ($1,000.00) which said bond, required in addition to the supersedeas bond for $16,000. heretofore given in the Circuit Court of Jackson County, Missouri, is also filed and which is to operate as a supersedeas.

JAMES ELLISON,
Presiding Judge of the Kansas City Court of Appeals of Missouri.

Filed Mar. 11, 1914. L. F. McCoy, clerk.

279 And on said date there was filed in the office of the Clerk of said Kansas City Court of Appeals a Writ of Error Bond, with the approval of the attorneys for defendant in Error, and of the Presiding Judge of said Court of Appeals endorsed in writing thereon, of which said bond and approvals the following is a correct copy, to-wit:

280 Copy.

In the Kansas City Court of Appeals (of Missouri), March Term, A. D. 1914.

No. 10996.

GEORGE B. MCADOW, Respondent,
vs.
THE KANSAS CITY WESTERN RAILWAY COMPANY, Appellant.

Writ of Error Bond.

Know all men by these presents: that we, The Kansas City Western Railway Company, as principal, and the United States

Fidelity & Guaranty Company as surety, are held and firmly bound unto George B. McAdow, in the full sum of One Thousand Dollars ($1,000.00) to be paid to the said George B. McAdow, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 10th day of March A. D. 1914,

Whereas, lately, at the March Term 1914, of the Kansas City Court of Appeals, and on the 2nd day of March A. D. 1914, in a suit pending in said court, between said George B. McAdow, Respondent, and the said The Kansas City Western Railway Company, judgment was rendered against the said appellant, The Kansas City Western Railway Company, and said appellant having obtained a writ of error of the said Court to reverse the judgment in the aforesaid suit, and the citation directed to the said George B. McAdow, Respondent, citing and admonishing him to be and appear in the Supreme Court of the United States, to be held at Washington D. C. not exceeding thirty days from and after the date of said citation.

Now the condition of the above obligation is such, that if the said The Kansas City Western Railway Company, Appellant (as Plaintiff in Error), shall prosecute said writ to effect, and answer and pay all damages and costs, if it fails to make good its said plea, then the above obligation to be void; else to remain in full force and virtue.

281 [Seal of K. C. Western Ry. Co.]

KANSAS CITY WESTERN RY. CO.,
By C. F. HOLMES, *Pres.*

Attest:
S. D. HUTCHINGS, *Secretary.*

[Seal of U. S. F. & G. Co.]

UNITED STATES FIDELITY & GUARANTY CO.,
By W. R. TAYLOR, *Attorney in Fact.*

Approved this 11th day of March A. D. 1914.
JAMES ELLISON,
Presiding Judg- of the Kansas City Court of Appeals.

Filed March 11th A. D. 1914.
L. F. McCOY,
Clerk of Kansas City Court of Appeals,
By F. M. LUDWICK,
Deputy Clerk.

O. K.
ATWOOD & HILL,
Att'ys for Geo. B. McAdow.

Filed Mar. 11, 1914. L. F. McCoy, Clerk.

282 And on said date there was also filed in the office of the Clerk of said Kansas City Court of Appeals an order of the Presiding Judge of said court approving said bond, as a supersedeas and granting said writ of Error, which order is in words and figures as follows, to-wit:

283 In the Kansas City Court of Appeals of Missouri, March Term, A. D. 1914.

No. 10996.

GEORGE B. MCADOW, Respondent,
vs.
KANSAS CITY WESTERN RAILWAY COMPANY, Appellant.

Now upon this 11th day of March A. D. 1914, comes the Kansas City Western Railway Company, Appellant, and presents its petition for a writ of Error to the Supreme Court of the United States, and its bond for a supersedeas, and said writ of Error is hereby allowed and said bond in the sum of $1,000.00 is approved, which said bond, required in addition to the supersedeas bond for $16,000, heretofore given in the Circuit Court of Jackson County, Missouri, is to operate as a supersedeas.

JAMES ELLISON,
Presiding Judge of the Kansas City Court of Appeals of Missouri.

Filed Mar. 11, 1914. L. F. McCoy, Clerk.

284 And thereafter, on the same date, there was filed in the office of the Clerk of said Kansas City Court of Appeals the Original Citation, with acceptance of service thereof, and which is attached hereto, as follows, to-wit:

285 In the Kansas City Court of Appeals of Missouri, March Term, A. D. 1914.

No. 10996.

GEORGE B. MCADOW, Respondent,
vs.
KANSAS CITY WESTERN RAILWAY COMPANY, Appellant.

Citation.

The United States of America to George B. McAdow, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at Washington, D. C., not exceeding thirty days from and after the day this citation bears date, pursuant to a writ of error filed in the Clerk's office of the Kansas

City Court of Appeals of Missouri, wherein the Kansas City Western Railway Company is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable James Ellison, Presiding Judge of the Kansas City Court of Appeals of Missouri, this 11th day of March A. D. 1914.

JAMES ELLISON,
Presiding Judge of the Kansas City Court of Appeals of Missouri.

We hereby acknowledge due service of the foregoing Citation this 11th day of March A. D. 1914, and enter an appearance in the Supreme Court of the United States.

JOHN H. ATWOOD,
Attorney for Defendant in Error George B. McAdow.

Filed Mar. 11, 1914. L. F. McCoy, Clerk.

286 STATE OF MISSOURI, *ss:*

In obedience to the commands of the attached Writ of Error, I hereby transmit to the Supreme Court of the United States, the complete transcript of the entire record with all things touching the same as appears from the records and files of my office in the case of the Kansas City Western Railway Company, Appellant and Plaintiff in Error, vs. George B. McAdow, Respondent and Defendant in error.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court. Done at office in Kansas City this 20th day of March A. D. 1914.

[Seal Kansas City Court of Appeals.]

L. F. McCOY,
Clerk of the Kansas City Court of Appeals,
By FRANK M. LUDWICK, *D. C.*

287 In the Kansas City Court of Appeals of Missouri, March Term, A. D. 1914.

GEORGE B. MCADOW, Respondent,
vs.
KANSAS CITY WESTERN RAILWAY CO., Appellant.

I, L. T. McCoy, Clerk of said Court, do hereby certify that there was lodged with me as such clerk, on the 11th day of March A. D. 1914, in the matter of George B. McAdow, Respondent, versus The Kansas City Western Railway Company, Appellant:

(1) The original bond of which a copy is herein set forth.

(2) Two copies of the Writ of Error, one for said George B. McAdow and one to file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Kansas City, Missouri, this 20th day of March A. D. 1914.

[Seal Kansas City Court of Appeals.]

L. F. McCOY,
Clerk of Kansas City Court of Appeals of Missouri,
By FRANK M. LUDWICK, *D. C.*

288 UNITED STATES OF AMERICA,
Kansas City Court of Appeals
of the State of Missouri, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within case.

In Witness Whereof I hereunto subscribe my name, and affix the seal of said Kansas City Court of Appeals in Kansas City, State of Missouri, this 20th day of March, A. D. 1914.

[Seal Kansas City Court of Appeals.]

L. F. McCOY,
Clerk of said Kansas City Court
of Appeals of Missouri,
By FRANK M. LUDWICK, *D. C.*

Fee for this transcript $25.00 paid by plaintiff in error.

Endorsed on cover: File No. 24,164. Missouri, Kansas City, Court of Appeals. Term No. 127. Kansas City Western Railway Company, plaintiff in error, vs. George B. McAdow. Filed April 13th, 1914. File No. 24,164.

2

No. 24164.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 127.

KANSAS CITY-WESTERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

VS.

GEORGE B. McADOW, DEFENDANT IN ERROR.

IN ERROR TO THE KANSAS CITY COURT OF APPEALS, STATE OF MISSOURI.

BRIEF FOR PLAINTIFF IN ERROR.

CHARLES F. HUTCHINGS and
McCABE MOORE,
Attorneys for the Kansas City Western Railway Company, Plaintiff in Error.

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INDEX OF AUTHORITIES.

Cases Cited.

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No. 24164.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 127.

KANSAS CITY-WESTERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

VS.

GEORGE B. McADOW, DEFENDANT IN ERROR.

IN ERROR TO THE KANSAS CITY COURT OF APPEALS, STATE OF MISSOURI.

STATEMENT.

George B. McAdow, plaintiff, in the Circuit Court of Jackson County, Missouri, instituted his action for the recovery of $25,000 damages for personal injuries received by him on the 18th day of December, 1911, while he was an employe of the defendant, Kansas City-Western Railway Company, as a motorman, operating an electric car of defendant, when it collided with another car of defendant near the village of Wolcott in the State of Kansas. The tracks of defendant ran from the City of Leavenworth, which was the western terminus, in an easterly direction to a point about 2½ miles west of the state line between Kansas and Missouri, and defendant has never had any track in the State of Missouri.

The original petition of plaintiff filed February 8, 1912, based his alleged cause of action arising in Kansas on the general law of master and servant, and alleged that he was injured while he was engaged in the work of a motorman, operating a car "over the tracks of said railway company running from Kansas City, Kansas, to Leavenworth, Kansas, and return," and that defendant was an intrastate railroad (Record p. 10).

Said plaintiff amended said petition, on May 18, 1912, by interlineation, by alleging that the car he was operating was "maintained by and was run over the tracks of said defendant company" (Record p. 14).

Said plaintiff filed another amended petition, on the 16th day of August, 1912, in which he based his alleged cause of action only on the Statutes of the State of Kansas, one of said statutes being entitled: "An Act relating to the liability of common carrier by railroads to their employees in certain cases, and repealing all acts and parts of acts so far as the same are in conflict herewith" (Record pp. 16-21).

On the 20th day of August, A. D. 1912, at the May Term of said Circuit Court, said defendant, with permission of the court, filed its motion to strike from the files in said cause said amended petition, filed as aforesaid, on the 16th day of August, 1912, on the ground that said amended petition was a departure from law to law and alleged a different cause of action from that alleged in the former petitions in said cause (Record pp. 21-22).

Before said court ruled on said motion, said plaintiff, on the 25th day of September, A. D. 1912, with leave of said court, filed his second amended petition in said cause alleging that defendant operated its cars "over its own lines and the lines of the Metropolitan Street Railway Company, with which it has a *traffic arrangement* whereby defendant's cars *are transported* over certain of said Metropolitan lines in Kansas City, Kansas, and Kansas City, Missouri;" that the defendant is a corporation duly organized and existing under the laws of the state of Kansas "and is not incorporated under the laws of the state of Missouri;" that defendant "was negligent in not providing plaintiff with a clear track;" that "said negligent and careless acts * * * were in violation of the acts of Congress governing and controlling actions for injuries received by servants of railroad

companies, such as plaintiff, while engaged in interstate commerce, in which the defendant herein was engaged," and based his alleged cause of action solely on the acts of Congress of the United States of America entitled: "An act relating to the Liability of Common Carriers by Railroads to their Employees in certain cases," approved April 28th, 1908, and an amendment thereto approved April 5th, 1910, commonly known as "The Employers' Liability Act" (Record, pp. 22-25).

Said defendant, with leave of said court, on the 3d day of October, 1912, filed its certain motion to strike from the files in said cause said plaintiff's second amended petition, filed on the 25th day of September, 1912, as being a departure from law to law and as alleging a new and different cause of action from that alleged in said plaintiff's original petition, and a different cause of action from that alleged in said plaintiff's amended petition, filed on August 16th, 1912 (Record pp. 25-26).

Said court overruled said motion to strike from the files said second amended petition, on the 19th day of October, 1912, to which ruling said defendant then and there duly excepted, and was given by said court until on or before the 9th day of November, 1912, in which to present and file its term bill of exceptions (Record p. 26).

On the 29th day of October, 1912, said defendant duly presented to said court its term bill of exceptions, to the ruling of said court in overruling said motion, which said term bill of exceptions was then and there duly allowed, signed, filed and made a part of the record in said cause, during the terms of said court at which such exceptions were taken (Rec. p. 27).

And thereupon, to-wit, on said 29th day of October, 1912, said defendant filed its answer to said second amended petition of said plaintiff, which answer was (1) a general denial of each and every allegation in said second amended petition; (2) a plea of contributory negligence and that defendant had not violated any statute enacted for the safety of its employees; (3) that at the time and place of said plaintiff's alleged injury on the 18th day of December, 1911, and for a long time prior thereto, he was in the employ of defendant in the capacity of a motorman and was engaged in the work of a motorman operating electric passenger cars of defendant over the tracks of defendant from Kansas City, *Kansas*, to Leavenworth, *Kansas*, and *return*, which

said cars were not operated by said defendant beyond the limits of the State of Kansas, and "the said services of said plaintiff as such motorman were to be performed and were performed wholly within the State of Kansas, and said plaintiff was not employed by defendant to perform any other service; that at said time there was and ever since has been a statute in force of and in the State of Kansas regulating the liability of common carriers by railroad to their employees which said statute contained among others a provision, in words and figures as follows, to-wit:

> "Sec. 3. That any action brought against any common carrier, under or by virtue of any of the provisions of this act, to recover damages for injuries to, or the death of any of its employees, such employees shall not be held to have assumed the risk of his employment in case where the violation by such common carrier, its officers, agents, servants or other employees of any federal or state statute enacted for the safety of employees contributed to the injury or death of such employee."

That any injury complained of in plaintiff's petition that said plaintiff may have received, if any, was not caused or contributed to by the violation by defendant, as a common carrier, its officers, agents, servants or other employees of any Federal or State statute enacted for the safety of employees and said plaintiff assumed all the risks and hazards of his said employment including negligence of his fellow servants.

(4) And for a further answer said defendant alleges that said plaintiff is not entitled to maintain this action and should not recover anything under his said second amended petition, which is based on Acts of Congress of the United States, because said second amended petition constitutes and is a departure from law to law and alleges a different and further cause of action from that alleged in his original petition in this cause, which was based on a common law cause of action, and also alleges a different and further cause of action from that alleged in his first amended petition in this cause, which was based on a statute of the State of Kansas.

(5) And for a further answer, said defendant alleges that if plaintiff was injured in the manner and at the time alleged in his second amended petition, which allegation is expressly denied by defendant, then such injury was caused solely or primarily

by his own negligence co-operating with the negligence of one A. W. Lowe, a fellow servant of said plaintiff" (Record pp. 5-7).

Upon the trial of said cause, the defendant, at the close of plaintiff's evidence, filed and presented to the trial court a demurrer to the evidence asking said court to direct a verdict for the defendant, which demurrer was overruled by the court, to which ruling said defendant then and there duly objected and excepted (Record p. 90).

At the close of all the evidence, the defendant moved the court to direct a verdict for the defendant and to instruct the jury that under the pleadings and the evidence, the verdict should be for the defendant, which motion was overruled by the court and duly excepted to by the defendant (Record p. 136).

After all the evidence had been introduced, the defendant requested the court to give to the jury certain instructions, Nos. 3 to 10 inclusive thereof, being rejected and refused by the court, and exception was duly taken by defendant to the refusal of the court to give each of said instructions (Record p. 136).

The case was tried at the January term, 1913, of said court, resulting on the 5th day of February, 1913, in a verdict and judgment, against said defendant, and in favor of said plaintiff, in the sum of $7500 (Record p. 139).

The motion of defendant for a new trial, filed in due time, expressly alleged as one of the grounds therefor, the overruling of the motion of defendant to strike from the files said second amended petition of said plaintiff, on said 19th day of October, 1912, and defendant saved an exception to such ruling by filing a term bill of exceptions (Record p. 140) and afterwards preserving it in the final bill of exceptions (Record p. 144).

After verdict, said railway company, in addition to filing said motion for a new trial (Record p. 140), also on 8th day of February, 1913, filed a motion in arrest of judgment (Record p. 141), both of which motions on the 22d day of March, 1913, were overruled by said trial court, said railway company then and there objecting and excepting to the overruling of said motions (Record p. 143).

Subsequently and in due time, said railway company (plaintiff in error herein) was duly granted an appeal in said cause to the Kansas City Court of Appeals (Record p. 143), which court was and is the highest court of law or equity in the State of

Missouri in which a decision could be had in said suit between the parties thereto aforesaid.

On the 2d day of March, A. D. 1914, said Kansas City Court of Appeals affirmed the judgment and ruling of said Circuit Court of Jackson County, Missouri (Record pp. 145-151).

On the 11th day of March, A. D. 1914, said railway company (plaintiff in error herein), presented its petition for writ of error, with assignment of errors to the Honorable James Ellison, Presiding Judge, of said Kansas City Court of Appeals, of the State of Missouri, which petition was allowed and thereby the cause comes into this court (Record pp. 151-163).

ASSIGNMENTS OF ERROR.

Assignments of Error urged by plaintiff in error are as follows:

I. The said Kansas City Court of Appeals as shown by its opinion erred in its construction of the Federal Employers' Liability Act of 1908 (35 U. S. Statute at Large, 65, Chap. 149), and the amendment thereto approved April 5th, 1910, as applicable to the facts and pleadings disclosed by the record in this cause, or as affording any basis of recovery in behalf of said George B. McAdow.

II. The said Kansas City Court of Appeals erred in not reversing the judgment of the trial court, to-wit: the circuit court of Jackson County in the State of Missouri.

III. The said Kansas City Court of Appeals erred in deciding and holding that the operating of the cars of said plaintiff in error under the written traffic agreements between the Metropolitan Street Railway Company and said plaintiff in error, whereby the said cars of the said plaintiff in error were operated over the tracks of said street railway across the state line into the state of Missouri constituted and made said plaintiff in error a common carrier of interstate commerce by railroad within the purview and contemplation of the Act of Congress of the United States of America, known as The Federal Employers' Liability Act of 1908 (35 U. S. Stat. at Large 65, Chap. 149), entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases," approved April 22d, 1908, and the Amendment thereto approved April 5th, A. D. 1910.

IV. The said Kansas City Court of Appeals erred to the prejudice and against the rights of said plaintiff in error, in deciding and holding that, under all of the evidence introduced in the trial of said cause, and the statutes and laws of the United States, known as The Federal Employers' Liability Act of 1908 and the amendment thereto approved the 5th day of April, A. D. 1910, the said George B. McAdow, defendant in error, was entitled to judgment against said plaintiff in error.

V. That the said Kansas City Court of Appeals erred, as shown by the undisputed facts in the record, in holding that there

was any legal evidence offered at the trial either proving or tending to prove, that said plaintiff in error, was a "common carrier by railroad" and engaged in commerce between the states of Kansas and Missouri, within the contemplation and purview of the statutes of the United States known as the Federal Employers' Liability Act of 1908, and the amendment thereto of April, 1910, as it was a conceded fact, alleged in the petition of defendant in error, that the cars of plaintiff in error when in the State of Missouri were operated only "on the tracks of the Metropolitan Street Railway" and that the passengers in said cars paid their fares of 5 cents each, to the conductor of said street railway company, which entitled them to transfers to all cars of said Metropolitan Street Railway Company and to any and all lines of said street railway company in Kansas City, Kansas, and Kansas City, Missouri, with the same right and privilege as any passenger boarding any other car of said Metropolitan Street Railway Company and therefore were not interstate passengers "by railroad" "which Congress had in mind" when it enacted said federal statutes "which in terms applies to carriers engaged in the transportation of passengers or property by railroad" and not by street railroads for "when street railroads carry passengers across a state line, they are, of course, engaged in interstate commerce, but not the commerce which Congress had in mind."

VI. That said Kansas City Court of Appeals erred in sustaining the trial court in its refusal to give to the jury instruction No. 3 requested by plaintiff in error, which instruction read as follows:

"The court instructs you that the operation of defendant's cars by the Metropolitan Street Railway Company under the written contracts dated in the years 1904 and 1907 between the defendant, the Kansas City-Western Railway Company and the Metropolitan Street Railway Company, would not constitute engaging in interstate commerce by the defendant."

The refusal of the trial court to give said instruction and the sustaining of the trial court in such refusal by the said Kansas City Court of Appeals was error, prejudicial to the rights of plaintiff in error because of so ignoring said written contracts referred to in said requested instruction the question of law, to-wit, whether or not plaintiff in error was an interstate common carrier by railroad within the purview of the Federal Employers' Liability Act of 1908, was left for the determination of the jury, without a proper consideration of said written contracts.

VII. That said Kansas City Court of Appeals erred in sustaining the trial court in said trial court's refusal to give to the jury instruction No. 5 requested by said plaintiff in error, which instruction read as follows:

"5. If you find and believe from the evidence of the case there was a written contract between defendant and the Metropolitan Street Railway Company under the terms of which said Metropolitan Street Railway Company operated and controlled the cars of defendant while upon the tracks of said company in Kansas City, Kansas, and Kansas City, Mo., and if you further find that on the .... day of June, A. D. 1911, said Metropolitan Street Railway Company was by order of the Federal Court placed in the hands of the receivers and that thereafter said cars were run and operated substantially as before the appointment of said receivers and no notice of the cancellation of said contract was given to this defendant, then the court instructs you that said cars are presumed to have been operated according to the terms of said contract."

The refusal of the trial court to give said requested instruction and the sustaining of the trial court in such refusal by said Kansas City Court of Appeals was and is in error, prejudicial to the rights of plaintiff in error, because the undisputed evidence was that in June A. D. 1911, said Metropolitan Street Railway Company was by order of the Federal Court placed in the hands of receivers and there was ample evidence on which the jury could have found that the cars of plaintiff in error were run and operated on the tracks of said street railway company in Kansas City, Kansas, and in Kansas City, Mo., substantially as before the appointment of said receivers, and there was no evidence that any notice of a cancellation of said contract was given to plaintiff in error, consequently said cars were presumed to have been operated according to the terms of said written contract and the jury should have been so instructed as requested by plaintiff in error.

VIII. That said Kansas City Court of Appeals erred in sustaining the trial court in its refusal to give to the jury instruction No. 7 requested by plaintiff in error, which read as follows:

"7. The court instructs you that if you find from the evidence that receivers were appointed for the Metropolitan Street Railway Company before the time plaintiff claims to have been injured and since the appointment of such receivers they have

not operated the cars of the defendant under said contracts, but have received said cars at the terminus of the defendant in Kansas without any contract or arrangement with the defendant, and have operated said cars from said terminus into and through Kansas City, Missouri, and back to the said terminus, then the court instructs you that the operation of said cars by said Metropolitan Street Railway Company did not constitute engaging in the business of interstate commerce by the defendant, and the plaintiff cannot recover."

The refusal of the trial court to give said requested instruction and the sustaining of the trial court in such refusal by said Kansas City Court of Appeals was error prejudicial to the rights of plaintiff in error, because if the said receivers of said street railway did operate said cars of plaintiff in error on the tracks of said street railway, and not under any contract or arrangement with plaintiff in error, from the terminus of the tracks of plaintiff in error, two miles west of the state into Missouri on said Metropolitan Street Railway tracks and back to the said terminus of the tracks of plaintiff in error, then said plaintiff in error would not be engaged in the business of interstate commerce either by railroad, by street railroad or in any other manner, and the jury should have been instructed if they found such a state of facts from the evidence that plaintiff in error was not liable in said action.

IX. That said Kansas City Court of Appeals erred in construing the terms and provisions of the written traffic contract entered into between the Metropolitan Street Railway Company and plaintiff in error, as shown by its opinion, in referring to said written contract wherein said Court of Appeals says: "and provision was made therein for the protection and imbursement of the street car company for any negligence of defendant's servants in operating its cars over its tracks."

Said written contract did not and does not contain any such provision.

There is no provision in said contract for the protection and imbursement of the street car company for any negligence of defendant's (plaintiff in error's) servants in operating its cars over the tracks of the street railway company; but, on the contrary, there is a provision in the contract (Sec. 6 of the contract dated July 16, 1904), for the protection and imbursement of plaintiff in error for any negligence of the agents or servants

of the Metropolitan Street Railway Company in operation of said cars.

Said plaintiff in error (under the provisions of said contract was only liable for its own negligence such as delivering defective cars to said street railway company, and not for the negligence of any servant in operating said cars over the Metropolitan tracks.

The modification of said contract dated June 27 1907, expressly provided (Sec. 3) that the "trainmen while so operating the cars of the Leavenworth company over the tracks of the Metropolitan company shall be under the exclusive jurisdiction, orders and control of the Metropolitan company, and as between said companies, shall in all respects be regarded for the time being as the employes of the Metropolitan company."

The said Kansas City Court of Appeals was therefore in error when it declared and decided that plaintiff in error was liable for the negligence of its "servants in operating its cars" over the tracks of the Metropolitan Street Railway Company.

Said street railway was not protected by any provision of said contract or imbursed for any negligence of the servants of plaintiff in error in operating its cars on the tracks of said street railway, for it was expressly provided that such servants as operated said cars on said tracks should be considered "employes of the Metropolitan Company."

Plaintiff in error was not liable to said Metropolitan Street Railway Company for the negligence of the employes or servants operating said cars, for said contract provided that such servants were not servants of plaintiff in error.

Such misconstruction by said court of appeals as to the terms of said contract was prejudicial error because, if the employes operating said cars were in law the employes of the Metropolitan Street Railway Company alone, then plaintiff in error was not engaged in the operation of said cars and was not within the purview of said Federal Employers' Liability Act of 1908 or the amendment thereto of 1910, upon which the alleged cause of action of defendant in error was solely based.

X. That the said Kansas City Court of Appeals erred in construing Sec. 6 of said written contract dated July 16, 1904, as shown by the opinion of said court wherein it says: "Section 6 provides that each shall be liable for the negligence committed by its agents and servants in running the cars of the defendant over the street car tracks."

Such a construction of said Section 6 by said court of appeals is erroneous and prejudicial to the rights of plaintiff in error, because by the terms of said Section 6, and the contract of which it was a part, the trainmen who operated cars of plaintiff in error when on the tracks of the street railway company were under "the exclusive jurisdiction and control" of the street railway company and "in all respects" were "employes of the Metropolitan Company" (Sec. 3 contract of July 27, 1907) and because by the express provision of said Section 6 the Street Railway Company was made liable for any negligence of "its agents or servants in the running of said cars" on the tracks of said street railway company, as such servants were the servants of said street railway company and plaintiff in error was liable only for its own negligence to said Metropolitan Street Railway Company such as by delivering to the Metropolitan Street Railway Company a defective car which was to be operated by said Metropolitan Street Railway Company.

Such misconstruction by said court of appeals as to the terms of said contract was prejudicial error because, if the employes operating said cars were in law the employes of the Metropolitan Street Railway Company alone, then plaintiff in error was not engaged in the operation of said cars and was not within the purview of said Federal Employers' Liability Act of 1908 or the amendment thereto of 1910, upon which the alleged cause of action of defendant in error was solely based.

XI. That the said Kansas City Court of Appeals erred to the prejudice and against the rights of plaintiff in error in holding and deciding that "the use of the street railway tracks in the transportation of passengers in its cars from Kansas into Missouri and from Missouri into Kansas was no more than the use of a terminal facility by defendant" the plaintiff in error herein and in deciding that: "an interurban trolley, or electric system of railway, running through more than one state carrying passengers, or freight or both, is undoubtedly engaged in interstate commerce, and is a railroad within the meaning of the Act of Congress."

XII. That the said Kansas City Court of Appeals erred to the prejudice and against the rights of plaintiff in error, in sustaining the trial court in overruling the motion of plaintiff in error, filed October 3rd, 1912, to strike from the files said defendant in error's second amended petition, filed the 25th day of Sep-

tember A. D. 1912, as being a departure from law to law, and as alleging a new and different cause of action from that alleged in said original petition of defendant in error, and a further and different cause of action from that alleged in the amended petition of said defendant in error filed August 16th, A. D. 1912, and said Kansas City Court of Appeals erred to the prejudice of the said plaintiff in error by holding and deciding that plaintiff in error waived the objection to such departure "by answering to the merits of the action finally pleaded and going to trial thereon."

Said plaintiff in error did not waive its objection to said departure by pleading to the merits of the action pleaded in the 2nd amended petition of said defendant in error, 1. because said plaintiff did not plead to the merits of said second amended petition in the first instance but, on the contrary, filed a motion to strike said second amended petition from the files in said cause, and did not plead to the merits of said second amended petition until after its said motion to strike said second amended petition was overruled and excepted to; 2nd. because said plaintiff in error did not plead to the merits of said second amended petition until it was compelled to do so, or allow a judgment to be rendered against it in the sum of $25,000, which was the amount prayed for in said second amended petition of defendant in error; 3rd. because when said plaintiff in error pleaded to the merits of said second amended petition it did so by filing an answer to said 2nd amended petition in which answer said departure was expressly pleaded as a defense in said action by alleging that said defendant in error was not entitled to maintain said action and should not recover anything under his said second amended petition, which is based solely on the Federal Employers' Liability Act of 1908 and the amendment thereto of 1910, "because said second amended petition constitutes and is a departure from law to law and alleges a different and further cause of action from that alleged in his original petition in this cause, which was based on a common law action, and also alleges a different and further cause of action from that alleged in his first amended petition in this cause, which was based on a statute of the State of Kansas"; 4th. because the objection to the erroneous ruling of the trial court on the said question of departure was not waived by plaintiff in error on account of not submitting "to further proceedings without protestation," as "It is only where there is a plea to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived," and

said plaintiff in error, under the undisputed facts, disclosed by the record urged its objection to said departure at the earliest opportunity by motion and continued to do so by asserting such objection afterwards in its answer and again in its motion for a new trial; 5th. because by the terms and provisions of said amendment of 1910 an action to enforce a liability thereunder can only be brought in a court in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of the commencing of such action; that this action having been originally based upon a cause of action at common law defendant was brought in a court in which plaintiff in error could be sued in a common law action but in which it could not be sued in an action based solely upon said Federal Statutes, and by the departure by amending said common law action to one based solely upon said Federal Employers' Liability Act of 1908 as amended by the Act of 1910, the plaintiff in error was compelled to submit to the jurisdiction of a court in which an action for liability under said Federal Statutes could not have been originally brought; that the record affirmatively shows that plaintiff in error was a corporation organized under the laws of the State of Kansas; that the cause of action, if any, arose in the State of Kansas, and there is no evidence or matter in the record showing that plaintiff in error was doing business at the time of commencing such action in the district or state of Missouri; that the provisions of said amendment of 1910 to said Federal Employers' Liability Act of 1908 fixing the venue and prescribing the court in which such actions should be brought is an essential part of said Federal Statutes and the decision of said trial court and of said Kansas City Court of Appeals that a common law action against plaintiff in error could be changed by amendment to an action based solely upon said Federal Statutes and that such departure was waived by plaintiff in error, although objected and excepted to and such objection inserted in and made a part of its answer, was in violation of said amendment of 1910 to said Federal Statute of 1908, and in violation of that portion of the 14th amendment to the court of the United States, which reads as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

XIII. The said Kansas City Court of Appeals erred to the prejudice of plaintiff in error in holding and deciding that plaintiff in error waived the departure in pleading arising from the changing of a common law action to one based solely on said Federal Statute of 1908 and the amendment thereto of 1910, although the plaintiff in error objected and excepted to such change and departure and inserted such objection in its answer because by such change and departure the plaintiff in error was compelled to submit to the jurisdiction of a court not authorized to entertain an action under said statutes against plaintiff in error and because said plaintiff in error was thereby deprived of its property without due process of law.

XIV. That the said Kansas City Court of Appeals erred to the prejudice, and against the rights of said plaintiff in error, in deciding and holding that the question of a departure is governed, in this case by the State law of Missouri, because in this case, the said question of departure involves the construction and effect of the statutes of the United States, known as the Federal Employers' Liability Act of 1908, and the amendment thereto of A. D. 1910, on which the cause of action alleged in the second amended petition of defendant in error is solely based, which said statutes should have "a uniform construction" and the same meaning and effect in all the states of the Union" (Record, pp. 151-158).

ARGUMENT.

The specifications of error above set forth may be divided generally into five groups.

First. Those based upon the decision of the Kansas City Court of Appeals, wherein said court erred in its construction of said Federal Employers' Liability Act of 1908, and the amendment thereto approved April 5th, 1910, as being applicable to the facts and pleadings disclosed by the record in this cause, and as affording a basis of recovery by said defendant in error against plaintiff in error; the refusal of said Kansas City Court of Appeals to reverse the judgment of the trial court; and the decision of said court of appeals "that, under all of the evidence introduced in the trial of said cause, and the statutes and laws of the United States known as The Federal Employers' Liability Act of 1908, and the amendment thereto of 1910, the said George B. McAdow, defendant in error, was entitled to judgment against said plaintiff in error." Under this head, we class specifications of error Nos. 1, 2 and 4.

Second. Those based upon the decision of said Kansas City Court of Appeals wherein it held that the operating of the cars of plaintiff in error over the tracks of the Metropolitan Street Railway Company in Kansas City, Kansas, across the State line into Kansas City, Missouri, under the written traffic agreements between said plaintiff in error and said street railway company, made said plaintiff in error a common carrier of interstate commerce "by railroad" within the purview and contemplation of the Act of Congress of the United States, known as The Federal Employers' Liability Act of 1908, and the amendment thereto of April 5th, 1910; and wherein said Court of Appeals held there was evidence proving, or tending to prove that plaintiff in error was a "common carrier by railroad" engaged in commerce between the States of Kansas and Missouri, within the purview and contemplation of said statutes of the United States, although the cars of said plaintiff in error when in the State of Missouri were operated only "on the tracks of the Metropolitan Street Railway Company" where all passengers in said cars paid their fares of 5 cents each to the conductor of said street railway company, which had charge of said cars of plaintiff in error, which fare of 5 cents entitled each and every passenger on said cars to transfer to all cars of said Metro-

politan Street Railway Company and to any and all lines of said Metropolitan Street Railway Company in Kansas City, Kansas, and Kansas City, Missouri, with the same rights and privileges as any passenger boarding any other car, on the tracks of said Metropolitan Street Railway Company in Kansas City, Kansas, or Kansas City, Missouri; and in which decision said Court of Appeals sustained the Circuit Court of Jackson County, Missouri, in its refusal to instruct the jury, upon the request of plaintiff in error, "that the operation of defendant's cars by the Metropolitan Street Railway Company under the written contracts dated in the year 1904 and 1907, between defendant, the Kansas City Western Railway Company and the Metropolitan Street Railway Company would not constitute engaging in interstate commerce by the defendant." Under this head, we class specifications of error, Nos. 3, 5, and 6.

Third. Those based upon the decision of said Court of Appeals wherein it sustained the Circuit Court of Jackson County, Missouri, in refusing to instruct the jury, as requested by plaintiff in error, if the jury found from the evidence, under the terms of a written contract the Metropolitan Street Railway Company operated and controlled the cars of defendant (plaintiff in error) while upon the tracks of said street railway company in Kansas City, Kansas, and Kansas City, Missouri, and that in June, A. D. 1911, said Metropolitan Street Railway Company was placed in the hands of receivers, by order of court, and that thereafter said cars were run and operated substantially as before the appointment of said receivers and no notice of the cancellation of said contract was given to said defendant, then said cars are presumed to have been operated according to the terms of said contract; also wherein said Court of Appeals sustained the ruling of said trial court in its refusal to instruct the jury, as requested by said defendant, that if the jury found from the evidence that the receivers of said Metropolitan Street Railway Company operated the cars of defendant from its terminus in the State of Kansas into and through Kansas City, Missouri, and back to said terminus of defendant's tracks in Kansas, without any contract or arrangement with defendant, then the operation of said cars by said Metropolitan Street Railway Company did not constitute engaging in the business of interstate commerce by defendant, and the plaintiff cannot recover. Under this head we class specifications of error Nos. 7 and 8.

Fourth. Those based upon the decision of said Court of Appeals wherein it construed different provisions of the traffic agree-

ments between the Metropolitan Street Railway Company and plaintiff in error erroneously and to the prejudice of plaintiff in error; that plaintiff in error was engaged in interstate commerce, and was a "railroad" within the meaning of said Act of Congress. Under this head, we class specifications of error Nos. 9, 10 and 11.

Fifth. Those based upon the decision of said Court of Appeals wherein it sustained the ruling of the trial court in overruling the motion of plaintiff in error to strike from the files the second amended petition of defendant in error, as being a departure from law to law, and as alleging a new and different cause of action from that alleged in his original petition and a further and different cause of action from that alleged in his first amended petition, and in deciding that plaintiff in error waived the objection to such departure. Under this head, we class specifications of error Nos. 12, 13 and 14.

The Facts.

(1) At the close of the evidence introduced by plaintiff in the trial court, the facts proved were about as follows:

That the tracks of plaintiff in error run from Leavenworth, *Kansas*, to 18th and Central Streets in Kansas City, *Kansas*, and plaintiff in error had no tracks in the State of Missouri; that when the cars of plaintiff in error reached 18th and Central Streets in Kansas City, Kansas, they were run onto the tracks of the Metropolitan Street Railway Company, where the conductors of said Metropolitan Street Railway Company took charge of said cars, operated them over Central Avenue in Kansas City, *Kansas*, to the Missouri state line and to 10th and Main Streets in Kansas City, Missouri, then back over the same route on the tracks of said Metropolitan Street railway Company to 18th and Central Streets in Kansas City, *Kansas*, where the cars were run onto the tracks of plaintiff in error and placed in charge of the conductors of plaintiff in error.

When said cars were on the tracks of the Metropolitan Street Railway Company the conductors of said Street Railway Company collected the city fare (5 cents) and had "exclusive control of them during that time" (Testimony of Jno. M. Egan, General Manager of Metropolitan Street Railway Company, Record, pp. 32 and 33).

The Metropolitan Street Railway Company, by its conductors, took charge of and operated the cars of plaintiff in error when said

cars reached the tracks of said Metropolitan Street Railway Company, as above stated, under and by virtue of written traffic agreements between said plaintiff in error and said Metropolitan Street Railway Company (Record, p. 31).

Passengers boarding said cars of plaintiff in error in Kansas City, Kansas, or Kansas City, Missouri, when such cars were on the tracks of said Metropolitan Street Railway Company, and all passengers in said cars when such cars were placed on the tracks of said Metropolitan Street Railway Company, paid the city fare of 5 cents to said Metropolitan Street Railway Company and all passengers were entitled to transfers good for transportation on any other car of said Metropolitan Street Railway Company in Kansas City, Kansas, or Kansas City, Missouri, "just the same as on any other car of the Metropolitan Street Railway Company" (Record, pp. 33 and 34).

On June 3, 1911, the Metropolitan Street Railway Company was placed in the hands of receivers (Record, p. 31).

Prior to the appointment of said receivers and ever since such appointment, the Kansas City Western Railway Company rendered bills to the Metropolitan Street Railway Company for the amounts due the motormen on the cars of said Kansas City Western Railway Company while on the tracks of the Metropolitan Street Railway Company in Kansas City, Kansas, and Kansas City, Missouri (Record, p. 36).

After said Metropolitan Street Railway Company was placed in the custody and control of receivers, the cars of plaintiff in error were operated when on the tracks of the Metropolitan Street Railway Company practically the same as before, and bills were rendered each month to said receivers for the payment of the motorman operating such cars (Record, p. 29).

For the use of the cars of plaintiff in error, the Metropolitan Street Railway Company and its receivers paid plaintiff in error 20% of the amount collected by said Metropolitan Street Railway Company when such cars were on the tracks of, and operated by, said Metropolitan Street Railway Company, or its receivers (Record, p. 31).

The testimony of George B. McAdow, plaintiff, was in substance as follows:

That he resided in Kansas City, Kansas, and first became an employee of plaintiff in error in February, 1906, as a motorman;

that he, as a motorman, operated the car of plaintiff in error between Leavenworth, Kansas, to 18th and Central Avenue in Kansas City, Kansas, over the tracks of plaintiff in error, and thence to 10th and Main Streets in Kansas City, Missouri, pursuant to an order of the train despatcher located at Wolcott, Kansas, communicated by telephone (Record, pp. 38 to 41).

That on the 18th day of December, 1911, he, as a motorman, operated one of said cars of plaintiff in error from Chelsea Junction, in the west part of Kansas City, Kansas, to 18th and Central in Kansas City, Kansas, thence over the tracks of the Metropolitan Street Railway Company to 10th and Main Streets in Kansas City, Missouri, and back over said tracks of the Metropolitan Street Railway Company to 18th and Central in Kansas City, *Kansas*, where the car was placed on the track of plaintiff in error, and where he received an order from the train despatcher, from Wolcott, Kansas, to meet another car at a town called Bethel, between Kansas City, Kansas, and Leavenworth (Record, pp. 46 and 47); that he ran said car to Bethel where he received another order, by telephone from the train despatcher to go to Wolcott, a distance of about four miles (Record, 47 and 48); that when his car, which was running about 45 or 50 miles an hour, was within a short distance of Wolcott, Kansas, it collided with another car of plaintiff in error, running on the same track from the opposite direction, in which collision he received severe personal injuries.

On cross examination he testified that he knew that the eastern terminus of the line of plaintiff in error was at 18th and Central Streets in western part of Kansas City, *Kansas* (Record, p. 56); that he supposed the conductor of the Metropolitan Street Railway Company was in charge of the car on which he was a motorman, when on the tracks of the Metropolitan Street Railway Company; that such conductor always took charge of the car, at 18th and Central in Kansas City, Kansas; that he, McAdow, did not run the car on the tracks of the Metropolitan Street Railway Company until the conductor of said Street Railway Company "got in the car" (Record, p. 57); that if the car met with a "breakdown" while on the tracks of the Metropolitan Street Railway Company, said street railway company would take care of such car (Record, p. 59); that he was familiar with the rules of plaintiff in error, and that he knew rule No. 52 read as follows:

> "Motormen when running on the Metropolitan Street Railway Company's tracks are working for the Metropolitan

Street Railway Company, and are subject to all their rules and regulations governing the Metropolitan employees. You must keep posted as to the rules and regulations governing the cars on the tracks where the Kansas City Western cars run" (Record, p. 65).

Other witnesses, testified as to the physical condition of defendant in error.

(2) After the refusal of the court to sustain a demurrer to the evidence and direct a verdict for defendant, the evidence on behalf of defendant, in substance, was as follows:

J. W. Richardson testified that he was general superintendent with charge of men and affairs in general; that plaintiff in error did not operate any cars in Missouri; that the train despatcher at Wolcott never gave any orders to a motorman when on the tracks of the Metropolitan Street Railway Company, nor beyond the terminus of the tracks of plaintiff in error at 18th and Central in Kansas City, *Kansas;* that Mr. Royal, who was train despatcher on the morning of the accident, was killed in the same collision in which McAdow was injured; that Mr. Royal ordered McAdow to go from Chelsea Junction to 18th and Central in Kansas City, *Kansas*; that the train sheet made by said Royal, the train despatcher, shows he ordered McAdow to go to the end of the line of plaintiff in error which was 18th and Central in Kansas City, *Kansas*, which was as far as the train despatcher had any authority to direct the running of the car (Record, pp. 91, 92); that plaintiff in error had no schedule for its cars running on the tracks of the Metropolitan Street Railway Company, and kept no account of the traffic in Missouri, as the Metropolitan Street Railway Company operated such cars in Missouri; that plaintiff in error, in order to save the motormen from going to the office of the Metropolitan Street Railway Company in Kansas City, Missouri, for their pay for their services in operating the cars for said Metropolitan Street Railway Company advanced the money for said Metropolitan Street Railway Company which repaid to plaintiff in error the amount so advanced; that Mr. McAdow did not perform any services for plaintiff in error, except in the state of *Kansas;* that plaintiff in error never operated, in any form or shape, any car in Kansas City, *Missouri*, and never had any person employed for that purpose; that plaintiff in error never received any portion of the fares of passengers, who boarded the cars of plaintiff in error after such

cars were on the tracks of said Metropolitan Street Railway Company, but such fares were collected by the Metropolitan Street Railway Company and was the sole property of said Metropolitan Street Railway Company; that plaintiff in error had an agent who sold tickets over its line in *Kansas*, between Kansas City, Kansas, and Leavenworth and intermediate points, but such agents never sold any tickets over the lines of the Metropolitan Street Railway Company, or any of them; that the cars of the plaintiff in error, after entering the tracks of the Metropolitan Street Railway Company were used as the said street railway company's own car on which said street railway company collected fares for all passengers and such passengers obtained transfers to all parts of the line on said Street Railway Company in Kansas City, Kansas and Kansas City, Missouri; that Mr. McAdow was not employed to perform and never did perform any service for plaintiff in error, except in the State of Kansas (Record, pp. 94-99).

A written notice to all operating officials and Trainmen of the Metropolitan Street Railway Company, signed by its Assistant Superintendent and approved by its General Superintendent, giving instructions what to do with cars of plaintiff in error if they became disabled on the tracks of said Metropolitan Street Railway Company was introduced in evidence as Exhibit "3" (Record, p. 100).

C. F. Cole, the auditor of said Metropolitan Street Railway Company testified that any passenger boarding a car, of plaintiff in error in Kansas City, Kansas, going to Kansas City, Missouri, on the tracks of said Metropolitan Street Railway Company would pay a five cent fare to the Metropolitan Company, and no part of said five cents was ever paid to plaintiff in error.

Likewise if a person boarded one of the cars of plaintiff in error when in Kansas City, Missouri, going to Kansas City, Kansas, the five cent fare was collected by the Metropolitan Street Railway Company for its sole use, and plaintiff in error was not entitled to any portion of said five cents; that even if the General Manager, of plaintiff in error, Mr. Richardson, boarded one of the cars of plaintiff in error in Kansas City, Missouri, and rode to Kansas City, Kansas, that he would have to pay his fare of five cents, and that the Metropolitan Street Railway Company would "get every cent of that nickle" (Record, p. 102).

The written "Traffic Agreement" of July, 1904, executed by plaintiff in error and the Metropolitan Street Railway Company

was introduced in evidence as Exhibit "4" (Record, pp. 104-109).

Another, or supplemental, traffic agreement, dated June 27th, 1907, executed by plaintiff in error and the Metropolitan Street Railway Company was also introduced in evidence as Exhibit "5" (Record, pp. 110-112).

On the 7th of July, 1911, the Metropolitan Street Railway Company by its Superintendent of Employment, wrote a letter to J. W. Richardson, General Superintendent of the Kansas City Western Railway Company, Leavenworth, Kansas (introduced in evidence as Exhibit No. "6") requesting the names of certain motormen operating cars of plaintiff in error on the tracks of the Metropolitan Street Railway Company, a portion of which reads as follows:

> "As an authority for this request, I quote Sec. 3, of Contract, between this company, and the Kansas City-Western Railway Company, dated June 27, 1907, which is as follows:
>
> 'That the Leavenworth Company will assume and pay all the costs of trainmen's wages while they are engaged in operating these cars over the tracks of the Metropolitan Company, but such trainmen while so operating the cars of the Leavenworth Company over the tracks of the Metropolitan Company, shall be under the exclusive jurisdiction, orders and control of the Metropolitan Company, and as between said companies, shall in all respects be regarded for the time being as employees of the Metropolitan Company.'
>
> Very truly yours,
>
> Julien H. Harvey,
>
> J. H. H.—S. Supt. of Employment."

(Record, pp. 135-136).

At the close of all the evidence, defendant's request to instruct the jury that, under the pleadings and the evidence, the verdict must be for defendant was refused by the court and duly excepted by defendant (Record, p. 136).

Plaintiff in error contends that the evidence failed to show it was an interstate railroad or that it was a common carrier by railroad within the purview and contemplation of the Act of Congress, on which the alleged cause of action in the last amended petition was based; that the court erred in refusing to strike from the files the last amended petition as being a departure which deprived plaintiff in error of substantial rights; that the court erred in its construction of the traffic agreements between plaintiff in

error and the Metropolitan Street Railway Company, to the prejudice of plaintiff in error; and that the court erred in refusing to give the instructions requested by plaintiff in error and especially the instruction for the jury to find a verdict in favor of plaintiff in error.

The Law.

"A decision of the highest court of a state, which affirmed a judgment in favor of plaintiff in an action in which the right to relief was exclusively based upon the hours of service act of March 4, 1907 (34 Stat. at L. 1416, Chap. 2939, U. S. Comp. Stat. Supp. 1911, p. 1321) and the employers' liability act of April 22, 1908 (35 Stat. at L. 65, Chap. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), and in which, at the close of the evidence, defendant had requested the court to instruct the jury to find in its favor, necessarily involves an adverse determination of a Federal question, *i. e.*, defendant's right to be shielded from responsibility under those statutes when properly applied, and a writ of error will therefore lie from the Federal Supreme Court to the state court."

"3. A contention in a state court in an action based solely upon a Federal statute, that there was no evidence tending to show liability under that statute, presents a Federal question which when denied, will support a writ of error from the Federal Supreme Court to the highest state court."

First and third propositions of the syllabi in the case of *St. Louis, Iron Mountain & Southern Railway Company, Plff. in Err.* v. *Mrs. Cordie McWhirter, Administratrix of the Estate of Etzeal McWhirter, Deceased*, 229 U. S. 265, 57 L. Ed. 1179, 33 Sup. Ct. Rep. 862.

In the language of Mr. Chief Justice White, who delivered the opinion in the McWhirter case, *supra*:

"While it is true, as we have said, that, coming from a state court, the power to review is controlled by Rev. Stat. Sec. 709, yet where, in a controversy of a *purely Federal* character, the claim is made and *denied* that there was *no evidence tending* to show liability under the Federal law, such ruling, when duly excepted to, is reviewable, because *inherently* involving the operation and effect of the Federal law."

In the case of *St. Louis, Iron Mountain & Southern Railway Company, Plff. in Err.* v. *May Taylor, Administratrix*, 210 U. S. 281, 28 Sup. Ct. Rep. 620, it is held:

"Where a party to litigation in a state court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the state, then the question thus raised may be reviewed in this court. The plain reason is that, in all such cases, he has claimed in the state court a right or immunity under a law of the United States and it has been denied to him. Jurisdiction so clearly warranted by the Constitution and so explicitly conferred by the Act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the states of the Union."

In the case of *Kansas City Southern Ry. Co. Plff. in Error* v. *Albers Commission Co.*, 223 U. S. 573, 56 L. Ed. 556, 32 Sup. Ct. Rep. 316, it is held:

"2. The United States Supreme Court may examine the entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a general finding of facts against one party necessarily involves the decision of questions of law bearing upon a Federal right claimed by such party in the state court."

In the case of *Norfolk & Western Ry. Co. Plff. in Err.*, v. *Conley, Attorney General of the State of West Virginia, et al.*, 236 U. S. 605, 35 Sup. Ct. Rep. page 437, it is held:

"2. The Federal Supreme Court, on writ of error to a state court, may analyze the facts in order to determine whether that which purports to be a finding of fact is so interwoven with the Federal question as to be in substance a decision of such question."

I. As plaintiff in error, in case at bar, contends that the evidence failed to prove any cause of action under the Federal Statute on which the alleged cause of action of defendant in error was based, and that the Kansas City Court of Appeals erred in affirming the judgment rendered in the trial court, as specified in Assignment of Errors, Nos. 1, 2, 3, 4 and 5 (Record pp. 151-152), it becomes necessary to consider and anaylze the facts, because the questions of fact inherently involve the operation and effect of the Federal Law.

It was a conceded fact, as alleged in plaintiff's petition that the electric cars of the Kansas City Western Railway Company were "transported over certain of said Metropolitan lines in Kansas City, Kansas, and Kansas City, Missouri," by virtue of a "traffic agreement" (Record, pp. 28 and 31); that said cars when on the tracks of the Metropolitan Street Railway Company were under the "exclusive control" of the conductor of said Metropolitan Street Railway Company (Record p. 33); and that the traffic agreement was in writing (Record p. 31).

Whether or not plaintiff in error was a common carrier of interstate commerce by railroad within the purview and contemplation of the Federal Statute on which the alleged cause of action was based depends upon the proper construction of the traffic agreements between said plaintiff in error and said Metropolitan Street Railway Company (Record pp. 104-112).

In the case of *Behen* v. *The Metropolitan Street Railway Company*, 85 Kans. Rep. 496, the Supreme Court of Kansas construed one of said written traffic contracts, in a case where a passenger was injured on one of the Kansas City Western Railway Company's cars, while on the tracks of and under the control of said Metropolitan Street Railway Company and in rendering the decision said court says:

> "One of the principal contentions is that the demurrer to the plaintiff's evidence should have been sustained on the ground of a failure of proof showing that the Metropolitan Street Railway Company was operating the car upon which plaintiff was a passenger at the time she was injured. As before stated, the car was owned by the Kansas City-Leavenworth Company, which operated a suburban line from Leavenworth to Kansas City, Kan. From the western limits of Kansas City, Kan., the Leavenworth cars were run over one of the lines of the Kansas City Elevated Railway to a connection in Kansas City, Mo., with the tracks of the Metropolitan company. For the purpose of showing that the car was in fact operated by the Metropolitan company the plaintiff introduced in evidence the contract between the Leavenworth company, described as the party of the first part, and the Metropolitan, Central Electric and Kansas City Elevated companies, described as parties of the second part. * * *
>
> We have carefully examined the provisions of the contract and, in our opinion, giving to its language the usual and ordinary meaning, but one construction as to the effect of its terms can be reached, which is, that the Metropolitan

Company was the controlling factor in the operation of all cars run over the line of railway from the city limits of Kansas City, Kan., into and through that city and Kansas City, Mo. The jury having given to the writing the correct interpretation there could have been no error in submitting it to them. (*Cosper v. Nesbit*, 45 Kan. 457, 25 Pac. 866.) The contract is long and space will permit reference to but a few of its provisions which lead to the foregoing conclusions. The Metropolitan company and the two other companies comprising the parties of the second part expressly agree to take and operate all cars which may be furnished to them at the point where the Leavenworth line intersects their lines and to assume and pay all expenses of operating such cars over, through or upon any of the tracks belonging to the Metropolitan company or the other two parties of the second part."

II.

Plaintiff in error herein, contends that, with a proper construction of said written agreements between it and the Metropolitan Street Railway Company (Record 104-112), together with the other evidence introduced in the trial of said cause, the evidence shows:

(1) That plaintiff in error was not an interstate railroad.

(2) That it was not engaged in interstate commerce.

(3) That defendant in error performed no service for plaintiff in error outside of the state of Kansas.

(4) That when he was engaged in the performance of interstate business it was only on a car which was in the sole custody and exclusive control of the Metropolitan Street Railway Company, which operated and controlled such car the same as it did all other cars, on the tracks of said Street Railway Company in Kansas City, Kansas, and Kansas City, Missouri.

The fact that plaintiff in error allowed the Metropolitan Street Railway Company to use its cars as street cars in Kansas City, Kansas, and Kansas City, Missouri, for the transportation of passengers over the lines of said Street Car Company in either or both of said cities, would not and does not make plaintiff in error an interstate railroad.

Section 4 of the written contract of July, 1904, between plaintiff in error and the street railway company, provides that the

street railway company should take and operate, at its own expense, the cars furnished by plaintiff in error; and that if any unusual number of cars is delivered by plaintiff in error, then reasonable notice is to be given to said street car company, "so that *the latter* may provide *employees* to *receive* and *operate* same. (Record, p. 105.)

Section 3 (Record p. 111) provides that "trainmen while so operating the cars of the Leavenworth Company over the tracks of the Metropolitan Company, shall be under the *exclusive* jurisdiction, orders and control of the *Metropolitan Company* and as between said companies shall in all respects be regarded for the time being as the *employees* of the *Metropolitan Company*.

A letter from the Metropolitan Company after it went into the hands of receivers, written to J. W. Richardson, General Superintendent of plaintiff in error, under date of July, 1911, shows that the receivers of said Metropolitan Street Railway Company were asserting their rights under said contract of 1907, and called attention to said Section 3, which said the Metropolitan Street Railway Company should have "exclusive jurisdiction, orders and control" over the trainmen in charge of the cars of plaintiff in error when on the Metropolitan tracks (Record, Exhibit No. 6, pp. 135-136).

The evidence of John M. Egan, General Manager of the Receivers of the Metropolitan Street Railway Company, introduced by defendant in error, was that when the cars of plaintiff in error arrived at 18th and Central Avenue in Kansas City, Kansas, about 2 miles west of the state line, the Metropolitan conductor took charge of the car as soon as it was on the Metropolitan tracks; collected the fares of passengers and had "exclusive control" during all the time while the car was running on Central Avenue, Kansas City, Kansas, to the state line, thence to 10th and Main Street in Kansas City, Missouri, and back over the same route to 18th and Central Streets in Kansas City, Kansas (Record pp. 32-33).

The evidence of George B. McAdow, himself, was that he knew of rule of plaintiff in error, No. 52, during the time he was working, which read as follows:

> "Motormen when running on the Metropolitan Street Railway Company's tracks are working for the Metropolitan Street Railway Company, and are subject to all of their rules

and regulations governing the Metropolitan employees. You must keep posted as to the rules and regulations governing the cars on the tracks where the Kansas City-Western cars run" (Record p. 65).

From the evidence above referred to it will be seen that the Metropolitan Street Railway Company, the plaintiff in error, and George B. McAdow, each and all, understood that the said George B. McAdow when he operated cars on the tracks of the Metropolitan Street Railway Company in Kansas City, Kansas, and Kansas City, Missouri, was "*working* for the *Metropolitan Street Railway Company*," which had "exclusive control" of such cars.

If he, at any time, was engaged in interstate business it was while he was "working for the Metropolitan Street Railway Company."

He might be working for a railroad engaged in interstate business, and immediately afterwards work for another railroad which was engaged in *intra*-state business.

In fact an employee can work for a railroad while engaged in interstate business, and immediately thereafter work for the *same* railroad while engaged in *intra*-state business, and if he is injured while the railroad was engaged in *intra*-state business he has no cause of action under the Federal Employers' Liability Act, as is clearly shown by the decision of this court in the case of *Illinois Central Rld. Co.* v. *Joseph Behrens, Administrator*, 223 U. S. 473, 34 Sup. Ct. Rep. 646, wherein the court held:

> "2. A fireman employed by an interstate railway carrier on a switching engine, who was killed while aiding in the work of moving several cars all loaded with intrastate freight, between two points in the same city, was not employed in interstate commerce within the meaning of the Federal Employers' Liability Act of April 22, 1908, making every common carrier by railroad, while engaged in interstate commerce, liable to an employee 'suffering injury while he is employed by such carrier in such commerce,' although upon completion of that task the switching crew was to have gathered up and taken to other points several other cars as a step or link in both interstate and intrastate transportation."
>
> "Here, at the time of the fatal injury the intestate was engaged in moving several cars, all loaded with intrastate freight from one part of the city to another. That was not a service in interstate commerce, and so the injury and resulting death were not within the statute. That he was expected,

upon the completion of that task, to engage in another which would have been a part of interstate commerce, is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."

The evidence in case at bar above referred to was not contradicted, but was made clearer by the testimony of J. W. Richardson, general superintendent of plaintiff in error, when he stated; that the motormen who operated cars of plaintiff in error, when on the tracks of the Metropolitan Street Railway Company were "strictly under orders of the Metropolitan"; that in order to save the motormen from going to Missouri to get pay for their said services, the plaintiff in error advanced the money to such motormen and that the Metropolitan Company repaid such money to plaintiff in error; that George B. McAdow was not employed to perform and did not perform any service for plaintiff in error, except in the State of *Kansas;* that plaintiff in error never had any tracks in the State of Missouri, and "never operated in any form or shape, any car in Kansas City, Missouri"; that the fares of all passengers boarding the cars, after being placed on the tracks of the Metropolitan Street Railway Company, were collected by said Metropolitan Street Railway Company as its sole property; that no part of such fares were ever paid to plaintiff in error; and that said Metropolitan Street Railway Company used such cars as its own and gave such passengers transfers *to all parts of* its line in Kansas City, Kansas, and Kansas City, Missouri, and that when any express or freight for Kansas City, Missouri, was transported on the line of plaintiff in error it was only to the end of its line in Kansas Cty, *Kansas*, and then taken from Kansas City, Kansas, to Kansas City, Missouri, by wagons (Record, pp. 95-98).

The evidence also shows conclusively that plaintiff in error was an electric *intra*-state railway with a line from Leavenworth, Kansas, to 18th and Central Streets in Kansas City, *Kansas*, which was the eastern terminus located about 2½ miles west of the Missouri state line; that it was not a common carrier of interstate commerce by railroad.

If it was a common carrier of interstate passengers, it was only by a "street railway" and therefore not within the purview or contemplation of any Act of Congress. In referring to the Interstate Commerce Act of 1887, this court held that: "Street Railroads carrying passengers across a state line are *not* governed by the provisions of the Interstate Commerce Act of 1887, which

in terms applies to carriers engaged in the transportation of passengers or property by *"railroad"* (*Omaha and C. B. Ry. Co.* v. *I. S. Com. Commission*, 230 U. S. p. 324, 33 Sup. Ct. Rep. p. 890.)

If plaintiff in error, itself, had operated the cars over the tracks of the Metropolitan Street Railway Company in Kansas City, Kansas, and Kansas City, Missouri (as the evidence shows to have been done by the Metropolitan Street Railway Company), it would have been by *"street railroad,"* and therefore, "not the commerce which Congress had in mind" when it enacted the Federal Employers' Liability Act of 1908, and the Amendment thereto of 1910.

The Federal Employers' Liability Act of 1906, which extended to all common carriers engaged in interstate commerce was held to be unconstitutional, because it included all common carriers engaged in interstate commerce, and extended to any employe, even though such employe was not engaged in interstate commerce. The Supreme Court of United States in January, 1908, in the Employers' Liability cases 207 U. S. 463 (28 S. Ct. 141), in an opinion rendered by Mr. Justice White decided:

> "A regulation of intrastate as well as of interstate commerce, and therefore one beyond the power of Congress to enact, is made by provisions of the Employers' Liability Act of July 11, 1906 (34 Stat. at L. 232, Chap. 3073, U. S. Comp. Stat. Supp. 1907, p. 891), that 'every common carrier engaged in trade or commerce' in the District of Columbia or in the territories or between the several states shall be liable for the death or injury of 'any of its employes' which may result from the negligence of 'any of its officers, agents, or employes.'
>
> "From the 1st section it is certain that the act extends to every individual or corporation who may engage in interstate commerce as a common carrier. Its all-embracing words leave no room for any other conclusion. It may include, for example, steam railroads, telegraph lines, telephone lines, the express business, vessels of every kind, whether steam or sail, ferries, bridges, wagon lines, carriages, trolley lines, etc."

Soon after the above decision President Roosevelt, on March 25th, 1908, sent to Congress a message, a portion of which reads as follows:

"I renew my recommendation for the immediate re-enactment of an Employers' Liability Law, drawn to conform to the recent decision of the Supreme Court."

The Employers' Liability Act, of April, 1908 (35 U. S. Stat. at L. 65, c. 169), does not extend to all common carriers engaged in interstate commerce but is restricted to carriers by "railroad," the 1st section of which reads as follows: "That every common carrier *'by railroad'* while engaging in commerce between any of the several states," etc., which clearly does not include electric street railways, according to the proper construction of the word "railroad" as construed by the Supreme Courts of Kansas, of Missouri, and of the United States.

(*Railroad Co.* v. *Commissioners*, 73 Kans. 168, and *Sams* v. *Frisco Ry. Co.*, 73 S. W. 686 (174 Mo. 53), and *Omaha & C. B. Ry. Co.* v. *I. S. Commerce Com.*, 33 S. Ct. 890, 230 U. S. p. 234.)

What then can be plainer under the evidence than that the plaintiff in error in this action is not included within the terms of Federal Employers' Liability Act of 1908, or the amendment thereto of 1910, which does not amend the Act of 1908 in reference to the *kind* of common carriers, and that both statutes restrict the kind of common carriers to "railroads."

Plaintiff in error never was a common carrier of passengers outside of the State of Kansas, unless it became such in Missouri, by virtue of its cars being run over the *Streets* of Kansas City, Missouri, on the tracks of the Metropolitan Street Railway Company, in which event it would not come within the provisions of the said Federal Statutes of 1908, which is applicable only to "railroads" and not to "street railways."

The evidence introduced by plaintiff conclusively shows that the conductor of the Metropolitan Street Railway Company took charge of appellant's cars 2½ miles west of the state line of Kansas and Missouri, and said cars were under the control of said Metropolitan Street Railway Company or its receivers, while such cars were on the tracks of said Metropolitan Street Railway Company which does not make plaintiff in error an interstate carrier of any kind "by railroad" or otherwise. The undisputed evidence was that plaintiff in error had no tracks beyond the point where the tracks of the Metropolitan Street Railway Company began, and from that point plaintiff in error's cars were operated the same as Metropolitan cars, to-wit, over the *public streets* as *street cars* to which the Federal Statute has no application.

Even if plaintiff in error had operated its cars on the tracks of the Metropolitan Street Railway Company over the *streets* in Kansas City, Missouri, and Kansas City, Kansas, described in the testimony of plaintiff and other witnesses in his behalf, the Federal Acts of 1908 and 1910 would have no application.

Even if the allegations of plaintiff's second amended petition on which the case was tried, to-wit: "That the defendant operates its cars from Leavenworth, Kansas, into Kansas City, Kansas, and across into Kansas City, Missouri, and back to Leavenworth, Kansas, on an hourly schedule, and daily transports over its own lines and the lines of the Metropolitan Street Railway Company, with which it has a *traffic arrangement whereby* the defendant's cars are transported over certain of said *Metropolitan lines* in Kansas City, Kansas, and Kansas City, Missouri," were true, the said Federal Statutes would have no application for those statutes do not apply to "*street* railways" regardless as to who operated or who owned the cars.

To use the language of the Supreme Court of the United States in the case of *Omaha & Council Bluffs Street Railway Company and O. & C. B. Ry.*, 4 *Bridge Co.* v. *Interstate Commerce Com.*, 33 S. Ct. Rep. page 891, 230 U. S. 324, in construing the Interstate Commerce Act of February, 1887:

> "If the act was aimed at railroads proper, then street railroads are excluded from the provisions of the statute. Applying this universally accepted rule of construing the word, it is noted that ordinary railroads are constructed on the companies' own property." * * * "street railroads, on the other hand, are local, are laid in streets as aids to street traffic, and for use of single communities, even though that community be *divided by state lines*, or under *different municipal control*. When street railroads carry passengers across a state line, they are, of course, engaged in interstate commerce, but not the commerce which Congress had in mind."

That it was the plain intention to restrict the *kind* of common carriers in re-enacting the Employers' Liability Act of 1908, so as not to include a street railway even if it carried passengers from Kansas into Missouri, is made evident and emphasized by the fact that, after the United States Supreme Court, in January, 1908, decided that the Act of 1906 included "steam railroads—express business vessels of every kind, whether steam or sail, ferries, bridges, wagon lines, carriages, trolley lines, etc.," and declared the Act of

1906 invalid, the said Act of 1908 was passed, pursuant to the President's message of March, 1908, "to conform to the recent decision of the Supreme Court."

In order to be certain that the Act of 1908 would not be declared invalid, Congress therefore did not use the broad language of the Act of 1906 and attempt to regulate *all* common carriers, but restricted and limited the Act of 1908 to "common carriers *by railroad*," which evidently and plainly does not include "street railroads."

Said Act of 1908 "was aimed at railroads proper." As decided by the United States Supreme Court in reversing the Commerce Court in the case of *O. & C. B. Ry. & Bridge Co., supra*, in construing the word "railroad," in the interstate commerce act, it does not include "street railroads carrying passengers across a state line."

III.

From an examination of the evidence above referred to and the law applicable thereto, we, also, contend that the trial court should have given at the request of plaintiff in error, instruction No. 3, the refusal of which is made the basis of assignment of error No. VI (Record, pp. 152-153).

Said instruction reads as follows:

> "3. The court instructs you that the operation of defendant's cars by the Metropolitan Street Railway Company under written contracts dated in the years 1904 and 1907 between the defendant, the Kansas City-Western Railway Company, and the Metropolitan Street Railway Company, would not constitute engaging in interstate commerce by the defendant" (Record, p. 137).

It was error to the prejudice of plaintiff in error for the trial court not to give instruction No. 5 requested by plaintiff in error, because the evidence of John M. Egan introduced by defendant in error was that the cars of plaintiff in error, were operated, by the Metropolitan Street Railway Company *after* the *receivers* were appointed, practically the same as before such appointment (Record, p. 29), and there was no evidence of any notice given to plaintiff in error of any cancellation of the written contract between said railway companies. On the contrary, the letter dated July 7, 1911, from the Superintendent of Employment, for the receivers to the

General Superintendent of plaintiff in error (Record, pp. 135-136), showed conclusively that the said cars were operated under the terms of said written contract.

Said instruction No. 5 reads as follows:

"5. If you find and believe from the evidence of the case there was a written contract between defendant and the Metropolitan Street Railway Company under the terms of which said Metropolitan Street Railway Company operated and controlled the cars of defendant while upon the tracks of said company in Kansas City, Kansas, and Kansas City, Mo., and if you further find that on the .. day of June A. D. 1911, said Metropolitan Street Railway Company was by order of the Federal Court placed in the hands of the receivers and that thereafter said cars were run and operated substantially as before the appointment of said receivers and no notice of the cancellation of said contract was given to this defendant, then the court instructs you that said cars are presumed to have been operated according to the terms of said contract." (Record, p. 137. Assignment of Error No. VII, Record p. 153).

The Kansas City Court of Appeals, also erred to the prejudice of plaintiff in error in sustaining the trial court in its refusal to give instruction No. 7 requested by plaintiff in error, which reads as follows:

"7. The court instructs you that if you find from the evidence that receivers were appointed for the Metropolitan Street Railway Company before the time plaintiff claims to have been injured and since the appointment of such receivers they have not operated the cars of the defendant under said contracts, but have received said cars at the terminus of the defendant in Kansas without any contract or arrangement with the defendant, and have operated said cars from said terminus into and through Kansas City, Missouri, and back to the said terminus, then the court instructs you that the operation of said cars by said Metropolitan Street Railway Company did not constitute engaging in the business of interstate commerce by the defendant, and the plaintiff cannot recover" (Record pp. 137-138. Assignment of Error No. VIII, Record, pp. 153-154).

There was some evidence that said cars of plaintiff in error were not operated under any contract, as John M. Egan, on direct examination testified as follows:

"Q. Tell the jury, if you will, whether or not there is any

contract that you operate under, the cars of the Kansas City-Western Railway over your line?
A. There is no contract" (Record p. 28).

On cross examination said witness also testifies as follows:

"Q. How did it happen that you put on a conductor to take charge of the Kansas City Western cars when it reached your tracks?
A. By an agreement with the Kansas City Western.
Q. Was that agreement in writing?
A. I think it was.
Q. Anyway, the operation of the Kansas City Western cars by the Metropolitan in charge of a Metropolitan conductor was pursuant to a written agreement executed before the receivers were appointed?
A. Yes, sir" (Record p. 31).

Said instruction No. 7 requested by plaintiff in error was applicable under the evidence on the theory of the Metropolitan Street Railway Company operating the cars of plaintiff in error, without any contract with plaintiff in error and there was some evidence tending to show that state of facts.

> "Where a party to litigation in a state court insists, by way of objection to or *requests* for instructions, upon a consideration of a statute of the United States which will lead, or, on *possible findings of facts may lead* to a judgment in his favor, and his claim in this respect being duly set up, is denied by the highest court of the state, then the question thus raised may be reviewed by this court."
>
> *St. Louis, I. M. R. Co.* v. *Taylor*, 210 U. S. 281, 28 Sup. Ct. Rep. 620, *supra*.

If said requested instructions Nos. 3, 5 and 7, referred to in Assignment of Error Nos. VI, VII, and VIII, (Record, 152-154) had been given the jury, by finding the facts to be as stated in said instructions, the jury could have found a verdict in favor of plaintiff in error, and the refusal to give said instructions was error calling for a reversal of the judgment herein complained of.

Said Kansas City Court of Appeals also erred in deciding that, in said written contract between said railway companies: "provision was made therein for the protection and imbursement of the street car company for any negligence of *defendant's servants* in *operating* its cars over its tracks. Passengers for Kansas points boarded its cars in Kansas City, Missouri, and while conductors changed *at* the *State line*, its motorman took the cars from

Kansas City under its orders and on its time table to the northern terminus. We consider these facts left no doubt that defendant was engaged in interstate commerce and that the court was justified in refusing its instructions" (Record p. 148).

There was no evidence that "the conductors changed at the State line."

The conductors changed at the eastern terminus of the line of plaintiff in error, at 18th and Central Streets in Kansas City, *Kansas,* which was 2½ miles *west* of the State line, according to *all* the evidence.

An examination of said written contracts, by this court, will disclose that the said Court of Appeals misconstrued the express provisions of said contracts, to the prejudice of plaintiff in error.

The said contracts expressly provided that the trainmen operating said cars on the Metropolitan tracks "shall be under the *exclusive* jurisdiction, *orders* and *control* of the Metropolitan Company, and as between said companies shall be regarded—as *employees* of the *Metropolitan* Company" (Sec. 3, contract of June, 1907, Record p. 111).

The letter of July 7, 1911, to General Superintendent of plaintiff in error, shows that the Metropolitan Street Railway Company and its receivers insisted that the men who operated said cars were *servants* and *employees* of the *Metropolitan* Company, and as authority therefor, cited, in said letter, said Section 3 of the contract of 1907 (Record pp. 135-136).

How then could plaintiff in error be held liable to the Metropolitan Company for negligence of the "*servants* in operating its cars," when such servants by the express provisions of said contract were servants of the *Metropolitan* Company?

The evidence of J. W. Richardson, General Superintendent of plaintiff in error (Record pp. 91-97), was that the train dispatcher of plaintiff in error had no authority to, and did not, give any orders relative to the operating of said cars beyond the line of plaintiff in error, which was at 18th and Central Streets in Kansas City, *Kansas.*

Said Court of Appeals alsco misconstrued the written contract of 1904 as is shown in its decision when it decided as follows:

> "Section 6 provides that each shall be liable for the *negligence* committed by its *agents* and *servants* in *running* the cars of defendant *over* the *street* cars tracks" (Record, p. 149).

Under a proper construction of said contract of 1904, there is nothing in said Section 6 (Record pp. 105, 106) to warrant or authorize a statement that the "agents or servants" of plaintiff in error operated said cars on the tracks of the Metropolitan Street Car Company, consequently plaintiff in error was not liable to the Metropolitan Company for any negligence of its "agents or servants in the running of said cars" on said tracks.

Said Section 6 provided and contemplated that said cars should be operated by the Metropolitan Company, which was to be liable for negligence of *"its agents* or *servants* in the *running* of said cars," and the "Leavenworth Company," plaintiff in error, should be held responsible to said Metropolitan Company only for negligence of said Leavenworth Company for delivering a defective or unsafe car, or similar negligence, but *not* for the negligence of "its *agents* or *servants* in *running* of said cars," for it was the Metropolitan Company alone which run and operated said cars, and had exclusive control thereof.

Even if said construction of said Section 6 of the contract of 1904, had been proper and correct, Section 3 of the Modification contract, executed in June, 1907, expressly provided that the "trainmen while operating the cars of the Leavenworth Company over the tracks of the Metropolitan Company shall be under the *exclusive jurisdiction, orders* and *control* of the Metropolitan Company, and shall in all respects be regarded for the time being as the employees of the Metropolitan Company" (Record p. 111).

It will thus be seen by a careful reading of said contracts that the trial court and the Kansas City Court of Appeals both misconstrued said written contracts, to the prejudice of plaintiff in error, as is claimed in Assignment of Errors, Nos. 9, 10, 11, set out in the Record at pages 154-156.

IV.

Said Kansas City Court of Appeals also erred to the prejudice, and against the substantial rights, of plaintiff in error, in sustaining the trial court in overruling the motion to strike from the files the 2nd Amended Petition, as it was a departure from law to law and from fact to fact, and stated an entirely different and further cause of action from that alleged in the original petition, based on a common law action, and an entirely different

and further cause of action from that alleged in the amended petition, based only on a statute of the State of Kansas, where the alleged cause of action arose (Record pp. 25-26 and Assignment of Error Nos. 12, 13 and 14, Record pp. 156-158).

For a copy of said original petition see Record pp. 10-11.

For a copy of the Amended petition see Record pp. 16-21.

For a copy of the 2nd Amended petition see Record pp. 22-25.

For a copy of motion to strike from files said 2nd Amended petition, and order of court overruling same see Record pp. 25-26.

For a copy of answer to said 2nd amended petition see Record pp. 5-7.

Plaintiff in error contends that there was reversible error for the court to overrule said motion, filed October 3, 1912, to strike from the files in said cause, plaintiff's second amended petition as being a "departure from law to law" and also a "departure from fact to fact," inasmuch as plaintiff's original petition stated an alleged cause of action at common law under the general law of master and servant, and said plaintiff's amended petition, filed August 16th, 1912, stated an alleged cause of action based solely and only on the Statutes of the State of Kansas.

The original petition alleged a common law cause of action for injuries received by said plaintiff in the line of his duty as an employee of defendant while it was an intrastate railroad, in the state of Kansas, "operating electric cars over the tracks of said railway company running from Kansas City, Kansas, to Leavenworth, Kansas, and return" (Record pp. 10-11).

In other words the original petition alleged that plaintiff's work and duties for defendant were wholly within the state of Kansas and that defendant's cars were operated wholly within said State of Kansas, and thereby clearly negativing all claim that defendant was an interstate railroad, or that he operated any car of defendant beyond the limits of the State of Kansas.

The introductory sentence describing parties plaintiff and defendant, in said original petition, formed no part of the statement of facts which were necessary to be in said petition to state a cause of action. Said introductory, before the statement of the cause of action, was merely a *descriptio personae*, after which came the words

"plaintiff *for his cause of action* against the defendant above named alleges that on December 18th, 1911, and for a long time prior thereto, he was in the employ of the defendant in the capacity of a motorman and it was his duty and he was engaged in the work of a motorman operating electric cars over the tracks of said railway company, running from Kansas City, Kansas, to Leavenworth, Kansas, and return."

Patterson on Missouri Code Pleading, Sec. 244, edition of 1901, says:

"If the caption contains not only the names of the parties, but also a description *of the capacity* in which plaintiff sues, or *defendant is sued*, this is mere *descriptio personae*, and *forms no part of the statement of facts*, which the petition is required to contain."

While said original petition affirmatively stated a common law cause of action, under the general law of master and servant, the second amended petition plainly states a new and different cause of action, based solely on the statute of the U. S. commonly known as "The Employers' Liability Act," and is a plain departure from the original petition and should have been stricken from the files.

To use the language of Justice White in the similar case, filed in this state, of *Union Pacific Railway Co.* v. *Wyler*, 158 U. S. 285:

"The most common, if not the *invariable* test of a departure in law, as settled by the authorities referred to, is a change from the assertion of a cause of action under the common, or general, law to a reliance on a statute giving a particular or exceptional right."

The facts necessary to constitute a cause of action under plaintiff's second amended petition are materially different from those necessary to constitute a cause of action under his original petition.

Questions of fact as to whether or not plaintiff in error's railroad was an interstate railway and whether it was doing an interstate business and whether the alleged "negligent acts of defendant, its agents, servants and employees were in violation of the acts of congress," and many other facts, are disputed and material questions, which, would have to be decided if the trial was upon the 2nd amended petition, but which would not be an issue in the case if tried upon the original petition.

The facts alleged in said original petition, if proven, would defeat any recovery under said second amended petition, and likewise the facts alleged in said second amended petition, if proven, would defeat any recovery under said original petition.

It is, therefore, self-evident that said second amended petition is not only "a departure from law to law," but is "a departure from fact to fact."

Said second amended petition is not only inconsistent with said plaintiff's former petition; but it is entirely antagonistic thereto, and to such an extent that the allegation in the original petition of plaintiff below if proven, or the allegations in his amended petition based on the Kansas Statutes would be a complete defense to the cause of action alleged in said second amended petition.

If the case had been tried on the original petition and the defendant below had filed for its answer the allegations contained in plaintiff's 2nd amended petition such allegations in the answer, if proven, would have been an absolute defense to the cause of action alleged in said original petition, and if the trial court had stricken out such answer, it would have been reversible error.

Such is the decision of the St. Louis Court of Appeals in the case of *Rich* v. *Frisco Ry. Co.*, 148 S. W. 1011, where such an allegation in the answer was stricken out, by the trial court, and after a judgment for plaintiff in the sum of $7000 was rendered, the defendant appealed and reversed the case because the trial court erroneously struck out that part of the defendant's answer.

In the case of *Clancy* v. *St. Louis Transit Co.*, 192 Mo. 615 (91 S. W. 510), in which the plaintiff sued for personal injuries, and the jury returned a verdict in his favor for $10,000. Justice Marshall in rendering the opinion said:

> "The defendant moved to require the plaintiff to elect which one of the causes of action in his petition he would stand on. * * *
>
> The court overruled the motion, and the defendant saved an exception by filing a *term bill* of exceptions, and afterwards by preserving it in the final bill of exceptions."

In the case of *Smith* v. *Baer*, 166 Mo. 392 (66 S. W. 167), an order of reference was entered, in November, 1895, during the October Term. In rendering the opinion the Supreme Court says:

> "The principal error alleged is the action of the court in sending the case to a referee. * * *

> If the defendant desired to have that action reviewed, he should have filed a bill of exceptions to the ruling at the October Term, 1895, and have embodied that term bill of exceptions, filed after final judgment at the April term, 1897."

In case at bar, plaintiff in error did file a term bill of exceptions, in accordance with the practice in the State of Missouri.

In case of *State ex rel. Webster* v. *Johnson*, 132 Mo. 105 (33 S. W. 782), the court said:

> "If the exception was duly taken and preserved in a bill of exceptions *during the term*, it will yet be available on appeal or writ of error."

We submit that there cannot be a better example of a plain departure than when the facts alleged in an amended petition constitute a good defense to the allegations of the original petition.

It is self-evident that such an amended petition should be stricken from the files.

The authorities on this subject show that the law denies "the right to plaintiff to amend his declaration asserting a right of recovery at common law so that a right to recover under a statute may be availed of."

This is precisely what the plaintiff below in case at bar, was attempting to do and which the Supreme Court of the U. S. in the case of the *U. P. Ry. Co.* v. *Wyler*, 158 U. S. 285 (15 S. Ct. Rep. 881), filed in the State of Mo., has decided cannot be done.

Mr. Justice White, in rendering the opinion of the court, discusses the right to amend under such circumstances and decided that:

> "As the first petition proceeded under the general law of master and servant, and the 2nd petition asserted a right to recover in derogation of that law in consequence of the Kansas statute, it was a departure from law to law." * * *
>
> "It is argued, however, that, as all the facts necessary to recovery were averred in the original petition, the subsequent amendment set out no new cause of action in alleging the Kansas statutes.
>
> If the argument were sound, it would only tend to support the proposition that there was no departure, or new cause of action from fact to fact, and would not in the least meet the difficulty caused by the departure from law to law. Even though it be conceded that all the facts necessary to give a right to recover were contained in the original petition, as this predicated the assertion of that right on the general law of

master and servant, and not upon the exceptional rule established by the Kansas statute, it was a departure from law to law. The most common, if not the invariable, test of departure in law, as settled by the authorities referred to, is a change from the assertion of a cause of action under the common or general law to a reliance upon a statute giving a particular or exceptional right."

In the Wyler case, *supra*, he sued the U. P. Railway Co., in the Circuit Court of Jackson County, Missouri, to recover damages for personal injury received by him in Wyandotte County, Kansas, and like plaintiff below in case at bar, in his first petition "proceeded under the general law of master and servant," and afterwards filed a second amended petition basing his cause of action on a Kansas statute.

The U. P. Railway Company, defendant, filed demurrers and answers to the various petitions of Wyler and the case was tried on the 2nd amended petition and afterwards an *answer* thereto in which the defendant alleged that "the cause of action alleged in the second amended petition was wholly different from that averred in the original and the first amended petition."

Mr. Justice White delivering the opinion of the court also says:

> "The decision as to the application of the Missouri law involves, first, the ascertainment of whether the amended petition presented a new cause of action. The legal principles by which this question must be solved are those which belong to the law of departure, since the rules which govern this subject afford the true criterion by which to determine the question whether there is a new cause of action in case of an amendment. In many of the states which have adopted the code system great latitude has been allowed in regard to amendment; but even in those states it is held that the question of what constitutes a departure in an amended pleading is nevertheless to be determined by the rules of common law, which thus furnish the test for ascertaining whether a given amendment presents a new cause of action, even though it be permissible to advance such new cause, by way of an amendment."

If it be a departure to file an amended petition in which the cause of action is based on a state statute, it certainly is more of a departure to base the cause of action in an amended petition on the Federal Statute, of 1908, as amended in A. D. 1910, known as the

"Employers' Liability Act," which "excludes the concurrent existence of any common law action for negligence arising out of the facts necessary to maintain an action under its provisions" and which supersedes and makes inoperative "all laws of the states by virtue of which a right of action heretofore existed to enable an interstate employe to recover damages for personal injuries against an interstate carrier."

> *Cound* v. *A. T. & S. F. Ry. Co.*, 173 Fed. 531.
> Doherty on Liability of Railroads to Interstate Employes, p. 65.

In the case of *Mondou* v. *N. Y. N. H. & H. R. Co.*, 223 U. S. page 1, 32 Sup. Ct. Rep. 178, this court held:

> "The laws of the several states, insofar as they cover the same field, were superseded by the enactment of Congress of the Employers' Liability Act, regulating the liability of interstate railway carriers for the death *or injury* of their employes *while* engaged in interstate commerce."
>
> "The suggestion that the Act of Congress is not in harmony with the *policy* of the state, and therefore that the courts of the state are free to decline jurisdiction, is quite inadmissible, because it pre-supposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state. As was said by this court in *Claflin* v. *Houseman*, 93 U. S. 130, 136, 137, 23 L. Ed. 833m, 838, 839: 'The laws of the United States are laws in the several states, and just as much binding on the citizens and courts thereof as the state laws are.'"

If the *effect* of changing causes of action from common law, or on a state statute, to a Federal statute is left to the *policy* of the different states, there will not be *uniformity*.

As this court in the Wyler case (*supra*), decided that he could not in his original petition base his cause of action on the general law of master and servant and then file an amended petition basing his cause of action on a Kansas Statute (even though the defendant demurred to each petition and also pleaded *to the merits* of each petition), and reversed the judgment rendered in favor of Wyler because his 2nd amended petition constituted a departure

from law to law, it seems too plain for further argument, that an amended petition having the cause of action on said "Federal Employers' Liability Act," referred to in plaintiff's 2nd amended petition in the case at bar, is a much greater departure, and should reverse any judgment in favor of plaintiff, especially when we consider the "construction and effect" of that act which has been placed upon it by the Supreme Court of the United States, which is conclusive upon all other tribunals.

> "A substantive right or defense arising under the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. 65 Chap. 149, Stat. 1913, Sec. 8657), cannot be lessened or destroyed by a local rule of practice."
>
> *Norfolk Southern Rld. Co.* v. *Ferebee*, 238 U. S. 269, 35 Sup. Ct. Rep. p. 781.

In case at bar, the 2nd amended petition, based on the Federal Statute, was in its nature such a *substantial change* in the nature of the cause of action as to constitute what is known as a departure from the law to law. The change was so *substantial* and a "matter of substance" to such a degree that the allegations of fact in either the original, or amended petition, if proven, would have been a complete bar and an absolute defense to his recovering anything under his second amended petition.

There could not have been a more "substantial change." It was not an amendment; but it was an entirely new, distinct, and different cause of action in the 2nd amended petition, based on the Federal Statute, which extinguished the alleged common law action of the first petition, as well as the cause of action in the 1st amended petition, based on a statute of the State of Kansas applicable only to *intrastate* railroads and employees engaged only in *intrastate* commerce.

As the substantive right of the railroad company in the case of *U. P. Ry. Co.* v. *Wyler*, 158 U. S. 281, *supra*, to raise the question of a departure, was *not waived* by a *plea* to the *merits* of the 2nd amended petition, when the change of the cause of action was only from a common law action to one based on a state statute, it certainly should not be held to be waived, in case at bar, where the departure is of the most "substantial change" imaginable, that is, by basing the alleged cause of action in the 2nd amended petition on the federal statute of 1908, which when applicable extinguished all rights at common law or under any state statute, and creates an entirely new and distinct cause of action. Under this claim, we class Assignments of Error, Nos. XII and XIII, Record pp. 156, 158.

V.

Said Kansas City Court of Appeals also erred to the prejudice of plaintiff in error, by sustaining the ruling of the trial court, and deciding that there was a waiver of said departure by filing an answer to said 2nd amended petition and not standing on said motion to strike said 2nd amended petition from the files and then allowing judgment to be rendered against it in the sum of $25,000, the amount prayed for in said 2nd amended petition.

According to the express provisions of said Amendment of 1910, to the United States Statute known as the Federal Employers' Liability Act of 1908 an action to enforce a liability thereunder can only be maintained in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be "doing business" at the time of the filing of such action.

The original action, under which plaintiff in error was brought into the Circuit Court of Jackson County, Missouri, was based on an action at common law of which said Missouri court had jurisdiction, and by the departure by changing said alleged cause of action to one based on said federal statute, said plaintiff in error was illegally compelled to submit to a trial in said court of a cause of action under said federal statute, over which said trial court had no jurisdiction, and in which court the cause of action, alleged in the 2nd amended petition, could not be maintained.

The record affirmatively shows that plaintiff in error was a corporation organized under the laws of the state of *Kansas* and not under the laws of the state of Missouri; that the cause of action, if any, arose in the state of Kansas where the tracks of said plaintiff in error were located; and there is no evidence showing that plaintiff in error was "doing business" in the state or district of Missouri at the time of commencing said alleged cause of action.

Said plaintiff in error contends that the provisions of said Amendment of 1910 to said Federal Statute of 1908, fixing the venue and prescribing the court in which such actions could be brought, is an essential part of said statutes and the rulings of said trial court and of said Kansas City Court of Appeals that a common law action against plaintiff in error could be changed by amendment to an action based solely on said Federal Statutes and that such a departure was waived by plaintiff in error, al-

though objected and excepted and such objection inserted in and made a part of its answer, was in violation of said Amendment of 1910 to said Federal Act of 1908, and in violation of that portion of the 14th Amendment to the Constitution of the United States, which reads as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

By bringing a party into a court in an action of which the court has jurisdiction and then rendering a judgment against such party on another and different cause of action of which said court does not have jurisdiction is taking property without due process of law, especially when the application of a federal statute, which should have a uniform construction, operation and effect throughout all the states of the Union, is involved.

The general jurisdiction of said Missouri court is not herein involved; but the question raised (by Assignments of Error, Nos. 12, 13 and 14, Record, 156, 158), has reference only to the place of suability.

Said Amendment of 1910, to the Federal Act of 1908, must have a uniform construction, operation and effect throughout the Union.

The courts referred to in said amendment have authority to adjudicate the rights and liability of the parties therein referred to, only on the terms and conditions mentioned in said amendment.

It is not a question for the courts of the various states to decide as to when a court acquires or loses the right or authority to entertain an action under said federal statute.

Said amendment fixing the venue and prescribing the district in which such actions may be instituted, cannot be nullified, or rendered ineffective, by the local *policy* of any state, by the decisions of state courts or by state legislative enactments.

In many states a defendant does *not* waive the question of departure by answering to the merits of the action finally pleaded and going to trial thereon. In other states the local policy may be different.

Suppose the legislature of Missouri should enact a statute providing that in any action at common law, arising in another state, against a common carrier by railroad, filed in the courts of Missouri by an injured employee, against a railroad not "doing business" in said state, that the said employee could amend his petition by changing his cause of action to one based on the Federal Statute, and if the defendant therein pleaded to said amended petition, then it waived its right to object to said Missouri court entertaining the cause of action based on the federal statute, which fixes the venue for all cases tried under said federal statute, and if said defendant fails to plead to said amended petition, then judgment should be rendered against it for the amount prayed for.

Such is the rule of practice in Missouri if the defendant is held to have waived objections to such departure, according to the decision of said Kansas City Court of Appeals, even though the defendant renewed such objections in its answer as was done in this case.

Would not such action on the part of the state of Missouri nullify the said amendment of 1910 in so far as fixing the district in which cases under the federal statute should be tried?

Does not the said decision of said Kansas City Court of Appeals, based on a rule of local practice nullify said amendment of 1910, which fixes the venue for actions brought under it, to the same extent as it would if based upon a positive legislative enactment?

It is clear that this action could not have been maintained under said Federal Statute in the state of Missouri if the action had originally been brought under said statute.

By the device of bringing this suit originally as a common law action and, by amendment, changing it to an action based upon the Federal Employers' Liability Act it was attempted to give the Missouri Court jurisdiction of an action based upon said Federal Act.

If this can be accomplished, then why may not the provisions of the Federal Act in relation to the venue of actions brought under it be rendered entirely nugatory?

It has always been held by Federal Courts that when it first appears that the facts necessary to confer jurisdiction on those courts do not exist, that the court will *sua sponte* dismiss the action without even a suggestion from either party.

The above argument is applicable to the Specifications of Error hereinbefore enumerated, and we ask that it be considered in connection with each of said Specifications of Error, since all

involve the failure of the Missouri Courts to properly apply the Federal Statute of 1908 and the Amendment thereto of 1910, according to the uncontradicted facts in evidence.

First, in the failure of said trial court to direct the jury, at the close of plaintiff's evidence, to find a verdict for plaintiff in error and the affirmance of such action and ruling of said trial court by the Kansas City Court of Appeals.

Second, in the failure of said trial court, at the close of all the evidence to direct a verdict in favor of this plaintiff in error under the pleadings and evidence, and the sustaining of such action of the trial court by the Kansas City Court of Appeals.

Third, the sustaining by said Kansas City Court of Appeals of the ruling and action of the trial court in refusing to give instructions Nos. 3, 5 and 7 (Assignments of Error Nos. VI, VII and VIII, Record pp. 152 and 153).

Fourth, in giving an improper and erroneous construction to the written contracts, (Exhibits, Nos. 4 and 5, Record pp. 104-112), between plaintiff in error and the Metropolitan Street Railway Company, to the prejudice of plaintiff in error.

Fifth, in the refusal of said Courts of Missouri to set aside the verdict of the jury and grant a new trial as requested by plaintiff in error herein.

Plaintiff in error, therefore, prays that the judgment of said Circuit Court of Jackson County, Missouri, and said Kansas City Court of Appeals may be reversed and set aside and held for naught; that plaintiff in error may have judgment granting it its just and lawful rights under the laws and Constitution of the United States, and that it may be restored to all things which it has lost by this action and because of said judgment of said Circuit Court of Jackson County, Missouri, and the affirmance thereof by said Kansas City Court of Appeals.

Respectfully submitted,

CHARLES F. HUTCHINGS and
MCCABE MOORE,
Attorneys for the Kansas City Western Railway Company, Plaintiff in Error.

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No. 24164.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 127.

KANSAS CITY-WESTERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

VS.

GEORGE B. McADOW, DEFENDANT IN ERROR.

IN ERROR TO THE KANSAS CITY COURT OF APPEALS, STATE OF MISSOURI.

REPLY BRIEF OF PLAINTIFF IN ERROR.

CHARLES F. HUTCHINGS and
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Attorneys for the Kansas City Western Railway Company, Plaintiff in Error.

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Owing to a misconception of the evidence and an erroneous statement of facts by counsel for defendant in error, in their brief, it is deemed necessary, by plaintiff in error, that a reply brief should be filed in order that this court may understand the facts in evidence as disclosed by the record in this cause.

The statements of fact, we refer to, though, doubtless, *not intentionally* erroneous on the part of counsel for defendant in error, might mislead this court in deciding this cause and we therefore call attention to some of them as follows:

First. On page 2 of said brief of defendant in error, it is stated that:

> "Plaintiff in error is an interurban railway company, operating a line of railway between Kansas City, Missouri, and Leavenworth, Kansas, about twenty-five miles in length, transporting *passengers, freight, express* and *mail* between said points, the cars moving over defendant's own rails and roadbed extending from Leavenworth, Kansas, to Kansas City, *Kansas*, and thence over the tracks of the Metropolitan Street Railway Company (which then was and now is managed by receivers appointed by the Federal Court for the Western Division of Missouri), to Tenth and Main Streets, in Kansas City, *Missouri*."

If the above statement were correct, then we concede that plaintiff in error *might* be held to have been "doing business" in Missouri and therefore liable to be sued in Missouri under the provisions of the "Employers' Liability Act of 1908" (35 U. S. Stat. at L. 65 C. 149), and the Amendment thereto of April, 1910, said Amendment being "An Act to Amend an Act Entitled 'An Act Relating to Liability of Common Carriers by Railroad to Their Employes in Certain Cases,' Approved April Twenty-second, Nineteen Hundred and Eight."

The question as to whether or not plaintiff in error operated its cars over the tracks of the Metropolitan Street Railway Company in Kansas City, Missouri, in the transportation of *passengers* was in dispute and a vital question at issue in the trial of the case; but the evidence of defendant in error, himself, showed conclusively that plaintiff in error did *not* transport "*freight, express* and *mail* * * * over the tracks of the Metropolitan Street Railway Company to Tenth and Main Streets, in Kansas City, *Missouri*," or to any other place outside of the State of Kansas.

After stating that he was employed by plaintiff in error in February, 1906, in answering questions propounded by his attorney, the said defendant in error, George B. McAdow, testified as follows:

> "Q. Do you know the way in which packages of freight or express were marked upon these freight cars that you drove?
>
> Mr. Cowherd: Objected to as not relevant or material to any issue in the case, and are not competent for proving any issue in the case. The purpose, I suppose, is to try to show

that we carried freight from Kansas City, Missouri, to points in Kansas. The fact a package is marked a certain way doesn't show it was carried on the road in that way, and as a matter of fact it was not.

The objection was by the court overruled. To which ruling of the court the defendant then and there duly excepted.

Q. How were the packages marked that you handled while working as a motorman on the defendant road?

A. Some of these shippers over here who shipped to Leavenworth. I can't think of all their names.

Q. Give any you recollect?

A. Well, I think Ginnocio & Jones—they are fruit dealers—Evans & Co. also—it is a drug house.

Q. Over in Kansas City, Missouri?

A. Yes, sir.

Q. And they were delivered where?

A. Along the road clear to Leavenworth.

Q. Did you handle the packages or not?

A. Yes—the motorman and conductor both handles them—that is, in loading them and unloading.

Mr. Cowherd: I take it is understood that our objection goes to all this testimony?

The Court: Yes, sir."

(Record, page 40).

On cross examination, he testified as follows:

"Q. Now, Mr. McAdow, when you were running these cars—this freight train—where did you take the train?

A. The freight—Chelsea Junction, in the morning.

Q. How many freight trains did you run?

A. They ran one freight train. It made two round trips a day.

Q. *Did you bring it over into Kansas City, Missouri?*

A. *No, sir.*

Q. No freight—so far as you know, of course, no freight could be put on that car in Kansas City, *Missouri*, if the *car didn't come over?*

A. *No, sir.*

Q. This freight that you received that was marked from Kansas City, Missouri, and Kansas City, Kansas, had been carried to Chelsea Junction in some other way? Is that correct?

A. To 4th and Minnesota, on a wagon they hired steady.

Q. It was carried on a wagon to 4th and Minnesota?

A. Yes, sir; the Kansas City Western had it employed.

Q. Do you know who employed that wagon—if you don't know you can't testify. Are you testifying to things you don't know—it was hauled there in wagons.
A. Yes, sir; a D. A. Morr wagon.
Q. *That is* the *transfer man?*
A. *Yes, sir.*
Q. And there it was put into this freight car that you say you ran?
A. Yes, sir.
Q. And those were the packages you speak of having been marked from some place in Kansas City, Missouri, to some place in Kansas.
A. *Yes, sir.*
Q. Now, when you ran a passenger car you would go to 18th and Central—*you knew that was* the *end* of the *Western line?*
A. *Yes, sir;* the Kansas City Western."
(Record, page 56).

As the above testimony of defendant in error conclusively shows that no freight or express was ever carried into Missouri on any car of plaintiff in error, and that all freight or express carried on cars of plaintiff in error was wholly within the State of Kansas, and if any of such freight or express was transported from or into the State of Missouri it was by wagon of a company, in the transfer business, we contend that the carrying of such freight, or express, by plaintiff in error, *only* in the State of *Kansas* would not and did not constitute "doing business" in the District of Missouri by plaintiff in error, or make it subject to be sued in said District of *Missouri* under the *Federal* Statute on which the judgment in case at bar is based, for the said Amendment of 1910 provides that a foreign railway corporation is subject to suit, only in the district of its residence, "or in which the cause of action arose, or in which the defendant shall be *doing business* at the time of commencing such action."

It was conceded, that plaintiff in error was a *Kansas* corporation having no tracks in Missouri, and, as alleged in the petitions of defendant in error, *"not incorporated* under the laws of the State of *Missouri."* Its office was at Third and Delaware Streets in the City of Leavenworth, Kansas (Testimony of George B. McAdow, Record p. 39).

Unless it was "doing business" in the district of Missouri, the courts of Missouri had no jurisdiction to adjudicate the

rights of plaintiff in error, under said federal statute and the Amendment thereto, and especially over the objection of said plaintiff in error.

If plaintiff in error had received freight or express in *Kansas* and obligated itself to carry such freight or express, into the State of Missouri, using connecting carriers as its agencies, it would not, thereby, be "doing business" in Missouri, and, consequently, would not be liable to be sued in Missouri.

Such would be the legal status of plaintiff in error, if it and its agencies, which transported the freight or express into Missouri, were common carriers subject to and controlled by the act of Congress of June 29, 1906, Sec. 7, commonly known as the "Carmack Amendment to the 'Hepburn Act,'" which makes the initial carrier responsible for the entire transportation.

> "An initial carrier, when a foreign corporation, is not made liable to suit on the contract of shipment *in a state* in which it was not carrying on business *in the sense* which has heretofore been held necessary to confer jurisdiction because of any agency of a connecting carrier within that state, affected by the provisions of the Carmack Amendment of June 29, 1906 (34 Stat. at L. 595, Chap. 3591, U. S. Comp. Stat. Supp. 1911, p. 1307), to the act of February 4, 1887 (24 Stat. at L. 379, Chap. 104, U. S. Comp. Stat. Supp. 1911, p. 1284), requiring the initial carrier receiving freight for transportation in interstate commerce to obligate itself to carry to final destination, using the lines of connecting carriers as its agencies."
>
> "The provisions of the amendment had the effect of facilitating the remedy of the shipper by making the initial carrier responsible for the entire carriage, but the amendment was *not intended*, as we view it, to make *foreign* corporations through connecting carriers, liable to suit in a district where they were *not* carrying *on business* in the *sense* which has heretofore been held necessary to confer jurisdiction." (*St. Louis Southwestern Railway Company of Texas, Plff. in Err.*, v. *Alexander*, 33 S. Ct. Rep. pp. 245-247, 227 U. S. p. 218).

In the case last cited the evidence clearly showed that the plaintiff in error was doing business in New York and therefore subject to suit in that state.

The evidence in case at bar, however, clearly shows, even by the evidence of defendant in error, above quoted, that plaintiff in

error herein, was not "doing business" in Missouri, by carrying in Kansas either freight or express, which was taken into and from Missouri by wagons of a transfer company, even if such transfer company could be considered an agency of plaintiff in error.

The determination of what constitutes "doing business" in a state by a foreign corporation is a federal question, and especially when that term is used in a *federal* statute like the said amendment of 1910 to the Federal Employers' Liability Act of 1908, which provides that in certain cases, the defendant must be "*doing business* at the time of *commencing* such action," in the district when the action is brought, or the courts in that district will not have jurisdiction.

The question involves the proper construction of the *federal* statute and its amendment, on which the judgment, in case at bar, was rendered, and therefore, is to be decided upon the principles which have heretofore prevailed in determining whether a foreign corporation is "doing business" within the district in such sense as to subject it to suit therein.

It must be transacting business in the district of such a character and to such an extent as to subject it to the jurisdiction and laws thereof before it can be said to be "doing business in a sense which has, heretofore, been held necessary to confer jurisdiction on a court therein over the objection of such foreign corporation."

In the case of *Robert M. Green* v. *Chicago Burlington and Quincy Railway Company*, 205 U. S. 532, 51 L. Ed. 917, 27 Sup. Ct. Rep. 595, it was decided:

> "Soliciting through its district freight and passenger agent in Philadelphia, freight and passenger traffic for a railway company incorporated in Iowa and having its eastern terminal at Chicago, is *not* doing business within the eastern district of Pennsylvania in such a sense that process can be served upon the corporation there."

Referring to the facts of said case, Mr. Justice Moody in delivering the opinion of the court says:

> "The eastern point of the defendant's line of railroad was at Chicago, whence its tracks extended westward. The

business for which it was incorporated was the carriage of freight and passengers, and the construction, maintenance and operation of a railroad for that purpose. As incidental and collateral to that business it was proper, and, according to the business methods generally pursued, probably essential, that freight and passenger traffic should be solicited in other parts of the country than those through which the defendant's tracks ran. For the purpose of conducting this incidental business the defendant employed Mr. Heller, hired an office for him in Philadelphia, designated him as *district freight* and *passenger agent*, and in many ways advertised to the public these facts. The business of the agent was to solicit and procure passengers and freight to be transported over the defendant's line. * * *

When a prospective passenger desired a ticket, and applied to the agent for one, the agent took the applicant's money and procured from one of the railroads running west from Philadelphia a ticket for Chicago and a prepaid order, which gave to the applicant, upon his arrival at Chicago, the right to receive from the Chicago, Burlington & Quincy Railroad a ticket over that road. Occasionally he sold to railroad employees, who already had tickets over intermediate lines, orders for reduced rates over the defendant's lines. In some cases, *for* the *convenience of shippers* who had received bills of lading from the initial line for goods routed over the defendant's lines, he gave in exchange therefor *bills* of *lading* over the *defendant's* line."

In the above case the court held that the defendant railway company was doing considerable business of a certain kind in Pennsylvania, but it was not "doing business in the sense necessary to give the courts in Pennsylvania jurisdiction of the case, though it had an agent in Philadelphia, and "designated him as district freight and passenger agent," hired an office for him in Philadelphia, "and in many other ways advertised to the public these facts."

In case at bar, the office of plaintiff in error was in Leavenworth, Kansas, as testified to by defendant in error (Record p. 39).

Among other authorities cited in the decision last above referred to, is the case of *Earle* v. *Chesapeake & Ohio Railway Company*, 127 Fed. 235, where the court held:

"Defendant, a Virginia railroad company, neither owned nor operated any railroad located in Pennsylvania, and main-

tained no office in that state, though three directors and its secretary resided there, who may at various times have received and given information indirectly affecting the corporation's business elsewhere. Defendant's cars, both freight and passenger, were transported through Pennsylvania by other railroads for the *convenience* of *passengers* and *shippers;* such railroads, however, paying for the use of the cars, and receiving the freight and passenger rates for that portion of the haul that was done in Pennsylvania. Defendant was also a member of a freight transportation line which maintained an agency in Pennsylvania for the solicitation of freight to be shipped under *through* bills of lading, *each* line *receiving* a *proportionate* share of the freight, and each contributing to the expense of the agency; and another railroad company, located in Pennsylvania, sold coupon tickets in connection with its own tickets only, good over defendant's road, *accounting each month* to *defendant* for *its* proportion of the *proceeds. Held*, that such facts did not justify a finding that defendant was doing business in Pennsylvania, so as to authorize it to be sued in that state."

In rendering the opinion (page 237), the court says:

"The vital question is, was the corporation doing business in the State of Pennsylvania? If it was not, the fact that the assistant secretary chose to live here could not confer jurisdiction upon any court; and in the federal courts, as I have already said, *every jurisdictional fact* must *appear* upon the record."

In referring to the arrangement between the defendant railway company and the Pennsylvania Railroad Company the court uses the following language:

"The defendant company, by an arrangement with the Pennsylvania Railroad Company, delivers certain of its passenger cars to the Pennsylvania Railroad Company, at Washington, District of Columbia, which cars are then made up into a train by the Pennsylvania Railroad Company, and operated by the Pennsylvania Railroad Company from Washington to Jersey City, New Jersey, and again returned to Washington solely in charge and management of employes of the Pennsylvania Railroad Company between the two last mentioned points, the revenue from passengers carried upon the said train between Washington and Jersey City being appropriated to and by the Pennsylvania Railroad Company; the object of this hiring by the defendant Company to the Pennsylvania Railroad Company of the said passenger cars

being to avoid the necessity of change by *through passengers* at Washington, District of Columbia, and the hiring and use of the coaches of the defendant company by the Pennsylvania Railroad Company while such coaches are in the service of the Pensylvania Railroad Company is paid for by the Pennsylvania Railroad Company on a mileage basis, at three *cents* per *car* mile. * * *

"The Pennsylvania Railroad Company, a railroad corporation incorporated, organized, and doing business in and under the laws of Pennsylvania, sells at its ticket offices in Philadelphia coupon tickets of the defendant company, but only in connection with the sale of Pennsylvania Railroad tickets, and *remits* on monthly ticket *balances* the moneys so derived from such sales, so far as the said moneys are to *pay* for the Chesapeake & Ohio Railway Company coupon, and only in connection with the purchase by passengers of tickets over the Pennsylvania Railroad to points where the said railroad connects with the railway of the said defendant company, or connects with other lines of railroad which ultimately connect with the railroad of the defendant company."

In applying the law applicable to the facts in that case, the judge rendering the decision (p. 240), says:

"As it seems to me, nothing in the foregoing statement constitutes such a doing of business in the State of Pennsylvania as subjects the defendant to the jurisdiction of the courts. Clearly, the mere residence of the three directors and the assistant secretary is not enough. The corporation maintains no office in the state, and the occasional giving of information to one of the directors, who is also the chairman of the finance committee, by the assistant secretary, and the infrequent receipt or posting of a letter, while these acts may indirectly affect the transaction of the corporate business elsewhere, do not, in my opinion, bring the corporation itself within this jurisdiction. Neither does the transit of the defendant's freight and *passenger cars* across the state, either separately or as solid trains, constitute the transaction of *corporate business* by the *defendant*. These cars are drawn by the Pennsylvania Company, and *not* by the *defendant* itself, and the *Pennsylvania* Company is paid for this service by *receiving* a due *proportion* of the *money paid* for *freight* and *passage*. The transportation is *not* the *defendant's* act, and the fact that its cars continue to be used, for the *convenience* of *passengers* and shippers, after the *state line* has been *reached* is *unimportant*. To hold otherwise would make many railroad companies suable in nearly every state in the Union,

> for it is well known that a freight car of any railroad may visit many states before it is finally returned to its owner. Such cars are *really hired* to other carriers, and for the *time* are the cars of the *railroad* that *hauls* them. *Wall* v. *Norfolk & West. R. Co.* (W. Va.), 44 S. E. 294. The sale of tickets over the defendant's railroad by the Pennsylvania Company in Philadelphia is only made in connection with the sale of the Pennsylvania Company's own tickets, and is largely for the *convenience* of *travelers.* If this constitutes the transaction of *corporate business* in a state, it is possible that every important railroad company in the United States may be sued in this district and in many other districts as well."

According to the above decisions, plaintiff in error would not be "doing business" in Missouri so as to subject it to suit in Missouri, even if the Metropolitan Street Railway Company had been a "railroad" within the purview of the federal law and had transported both freight and passenger cars of plaintiff in error into Kansas City, Missouri, for as said in the last decision, *supra*:

> "Neither does the transit of defendant's freight and passenger cars across the state, constitute the transaction of *corporate business by the defendant.*"

Another statement in the decision, last cited, is applicable to the case at bar when the court said:

> "The transportation is not the defendant's act, and the fact that its cars continue to be used, for the *convenience* of *passengers* and shippers, after the *state line* has been reached is *unimportant.* To hold otherwise would make many railroad companies suable in nearly every state in the Union."

The Pennsylvania Company was paid a due proportion of the money received for freight and passengers which also was held to be immaterial.

> "Such cars are really hired to the other carrier and *for the time* are the case of the *railroad* that *hauls* them."

All this is true, in case at bar. Besides the Metropolitan Street Railway Company received and retained *every nickle* collected from every passenger that boarded the cars of the plaintiff in error after said cars were placed on its tracks at 18th and Central Avenue in *Kansas—2½* miles west of the State line, and plaintiff in error herein never received *one cent* of *such money so collected* by the

Metropolitan Street Railway Company which had *exclusive jurisdiction* and *control* of such cars and the *employees* thereon, and operated said cars as other street cars with transfers to all its passengers to and from its other cars in K. C., Kansas, and K. C., Missouri.

The fact that the motorman in the general employ of plaintiff in error operated such cars is not material, for plaintiff in error, the Metropolitan Street Railway Company and defendant in error, each and all understood that such motorman were for the time being in the employ of the Metropolitan Street Railway Company, which operated and had exclusive charge of such cars (Record, p. 111, Sec. 3 of contract of 1907. Record, p. 65, Rule 52 with which defendant in error was familiar.)

> "One may be in the general service of another, and nevertheless, with respect to *particular* work, may be transferred, with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person, with all the legal consequences of the new relation."
>
> (*Standard Oil Co.* v. *Anderson*, 29 Sup. Ct. Rep. p. 253, 212 U. S. p. 215.)

In all such cases, the fact that the cars of a foreign railway corporation, are transported into another state on the track of another railroad company, by such other company, "for the convenience of passengers, after the *state line* has been reached is unimportant," and does not constitute "doing business" in such state by the foreign railway company so as to subject it to the jurisdiction of the courts of that state within the contemplation of the federal law.

We contend that defendant in error was the employee of the Metropolitan Street Railway Company in transporting cars containing passengers across the state line, and was the employee of plaintiff in error, *only* when on the tracks of plaintiff in error in *Kansas*.

Even if plaintiff in error is held to have been engaged in the transportation of interstate passengers, before, or after, the time when defendant in error received his injury, the record in this case fails to disclose, unless by inference founded upon inference, any evidence of plaintiff in error having any *interstate* passenger on the car at the time or place when defendant in error received his alleged injury on the 18th of December, 1911.

If any person was a passenger on said car, on said date, who went from Kansas into Missouri, or *vice versa*, the evidence does not show such a state of facts.

If passengers boarded said car in Kansas City, Missouri, on said date, they may have left said car on many streets before it reached the state line, or may have left said car in Kansas City, Kansas, while on the tracks of said Metropolitan Street Railway Company and *before* the car reached the tracks of plaintiff in error, at 18th and Central Avenue in *Kansas*—2½ miles from the state line.

The evidence in the record does show that *one* passenger was on said car at the time of the injury to the defendant in error, and that passenger (James Worfold) was a witness in the trial of this case, who testified that he boarded said car at 18th and Central Avenue, in *Kansas*, at the Eastern terminus of the tracks of said plaintiff in error, and that he was going to Walcott in *Kansas*. He was an *intrastate* passenger as shown by his testimony which was as follows:

"Q. Your residence is where?
A. Kansas City, *Kansas*.
Q. You were there on the car when the accident occurred, on the 18th of December, 1911, on the day McAdow was hurt?
A. Yes, sir.
Q. *Where* did you board that car?
A. 18th and Central—Kansas City, *Kansas*.
Q. And your destination purpose was to be what?
A. Walcott" (Record, p. 69).

The town of Walcott was conceded to be *in Kansas*, and it was so alleged in the petition on which the alleged cause of action was tried (Record, p. 23).

The evidence therefore, as disclosed by the record, does not show that defendant in error was engaged in *inter*state commerce, or that plaintiff in error was engaged in such commerce *"at the time* of the injury."

The fact that the car had been used in interstate commerce by the Metropolitan Street Railway Company (or even by *plaintiff in error*) did not affect its *intra*state status *at* the *time* of the *injury;* for, if the fact that cars had been recently engaged in interstate commerce, or was expected soon to be used in such commerce,

brought them within the class of interstate vehicles, the effect would be to give every car on the line that character.

Both a carrier and its employees often pass rapidly from *one* class of business to another.

The Federal Employers' Liability Act of 1906, was held to be invalid because it attempted to regulate "*intrastate* as well as interstate commerce and therefore beyond the power of Congress to enact" (Federal Employers' Liability Cases, 207 U. S. p. 463).

Under the Act of 1908, an employee, before he can recover, must be engaged in *interstate* commerce "at the time of his injury."

In the case of *Illinois Central Railroad Company* v. *Behrens, Administrator*, 223 U. S. 473, this court held:

> "A fireman employed by an interstate railway carrier on a switching engine, who was killed while aiding in the work of moving several cars all loaded with *intrastate* freight, between two points in the same city, was not employed in interstate commerce within the meaning of the Federal Employers' Liability Act of April 22, 1908."
>
> "Here at the time of the fatal injury the intestate was engaged in moving several cars, all loaded with intrastate freight from one part of the city to another. That was not a service in interstate commerce, and so the injury and resulting death were not within the statute. That he was expected, upon the completion of that task, to engaged in another which would have been a part of interstate commerce, is immaterial under the statute, for by its terms the true test is the nature of the work being done *at the time* of the *injury*."

In that case the Illinois Central Railroad Company *was* an *interstate* carrier.

In case at bar, plaintiff in error is not liable as an interstate carrier for the following reasons:

(1) Because its cars were transported by a Street Railway Company, which had *exclusive control* and *operation* of the cars and employes thereon whenever they were operated across the state line.

(2) Because no interstate passenger was on said car *"at"* the *time* of the *injury*," in Kansas.

(3) Because "the true test is the *nature* of the work *being done* at the *time* of the *injury*."

(4) Because, if plaintiff in error, could be held to be a carrier of *interstate* passengers, it was not "doing business" in *Missouri* when and where this action was wrongfully brought, in violation of the provisions of the Amendment of 1910 to the Federal Statute of 1908, on which the judgment was based.

While said federal statute does not expressly provide that a foreign railroad company shall have the right to object to being forced to defend an action under said statutes in a district where a verdict may be rendered by only *three-fourths* of the jurors composing the panel, yet, such is the *effect* of said federal statutes, in case at bar, by the provision which in substance states that a *Kansas* corporation with *tracks only* in *Kansas*, where the cause of action arose, cannot be compelled to defend such an action in a district where it is not "doing business."

By the constitution and laws of the State of Missouri the *common* law right of trial by jury, which required the unanimous voice of all the jurors has been abolished. Doubtless it is competent for the State of Missouri to wholly abolish the right of jury trial in its Circuit Courts. By the constitution and laws of the State of *Kansas*, parties are entitled absolutely to a trial by a jury of twelve men, whose verdict must be *unanimous*.

If plaintiff in error had been sued in the courts of Kansas, where it could only have been sued by the provisions of said federal statute, it would have been entitled to a jury trial; but, having been sued in *Missouri* it was deprived of that right, where *three-fourths* of the jurors may return a verdict (Sec. 7280, Rev. Stat. of Mo. 1909). That was one of the reasons plaintiff in error had for objecting to said suit under said federal statute which gave it the right to raise a jurisdictional question without specifying the reasons it had for so doing.

According to the principles heretofore prevailing in the federal courts, as shown by the decisions hereinbefore referred to and others therein cited, plaintiff in error, in case at bar, was not "doing business" in the district of Missouri, with either freight or passenger in the manner necessary to have given the courts in the district of Missouri jurisdiction of the action in which the judgment, herein complained of, was rendered, for said action was based on a *federal* statute which *fixes* the *venue* and is to be construed in accordance with the decisions of the *federal* courts, in determining what constitutes "doing business" in a state.

SECOND. Another erroneous statement of facts, also *not* intentionally erroneous, is as to the *location*, or place where the passenger cars of plaintiff in error were transferred to the tracks of the Metropolitan Street Railway Company.

On page 3 of said brief of defendant in error it is stated that:

> "McAdow, was at the time of his injury, December, 1913, a motorman in the employ of plaintiff in error, and has been such motorman since February, 1906 (R. 38), in both passenger and freight service. His first order on taking his car out the morning in question, at *Chelsea Junction, which was the point* in Kansas City, Kansas, *where* the defendant's *cars went upon the tracks of the Metropolitan.*"

The cars of plaintiff in error "went upon the tracks of the Metropolitan" at *18th and Central* Streets in Kansas City, Kansas, which was the eastern terminus of the track of plaintiff in error, about 2½ miles *west* of the state line.

The *place* where the cars of plaintiff in error *"went upon the tracks of the Metropolitan"* was at *18th and Central* Streets and *not* at *Chelsea Junction.* This was shown by the undisputed testimony of all the witnesses who testified on that subject, to-wit: George B. McAdow, defendant in error, John M. Egan, General Manager for the Metropolitan Street Railway Company, and J. W. Richardson, General Superintendent for plaintiff in error.

We deem this matter important also in considering the contention of defendant in error that the train despatcher of plaintiff in error *gave orders relative* to the *operation* of cars when on the tracks of the Metropolitan Street Railway Company.

Said train despatcher, from his office in Walcott, Kansas, located about half way between Kansas City, Kansas, and Leavenworth, Kansas, *did* give orders relating to the operating of cars between *Chelsea Junction* and *18th and Central Streets* at Kansas City, Kansas, for such cars were then on the tracks of *plaintiff in error* and *not* on the tracks of the *Metropolitan Street Railway Company.*

Said train despatcher *never* gave *any* orders to a motorman when on the tracks of the Metropolitan Street Railway Company, nor beyond the terminus of the tracks of plaintiff in error at *18th and Central* at Kansas City, Kansas. He had no way in which he *could* communicate with any person on the car after it

left the eastern terminus of the tracks of plaintiff in error, (which was 2½ miles *west* of the state line at 18th and Central Avenue in *Kansas*). The train sheet showed that he ordered Mr. McAdow, defendant in error, on the 18th of December, 1911, to go from *Chelsea Junction* to *18th and Central*, which was the end of the line of plaintiff in error, which was as far as he had any authority to direct the running of a car (Record, pp. 91 and 92, testimony of J. W. Richardson).

It might be said to be *self-evident* and a matter of common knowledge, that a train despatcher of an interurban railway, located in his office 10 or 12 miles *west* of Kansas City, Kansas, could not and would not be permitted by the cities of Kansas City, Kansas, or Kansas City, Missouri, with a combined population of almost half a million, to direct the operation of street cars running on the streets of both, or either, of said cities. It *would* be *impracticable* and *against safety* of the *public*.

That *18th and Central* Streets was the place where the cars of plaintiff in error were transferred to the Metropolitan tracks was shown also by the uncontradicted testimony of John M. Egan, General Manager of the Metropolitan Street Railway Company, whose testimony on that subject was as follows:

> Q. Do you know where the Kansas City Western tracks stop over in Kansas City, Kansas, at 18th and Central Avenue?
> A. I do, sir.
> Q. *That is where the cars* themselves *come* onto the *Metropolitan Street Railway tracks*, is it not?
> A. Yes, sir.
> Q. The Kansas City Western has no road bed or tracks in Kansas City, Missouri, that is a fact, isn't it?
> A. Not that I know of, sir.
> Q. Now when it gets to 18th and Central in Kansas City, Kansas, the Metropolitan Street Railway Company conductor takes charge of the car, is that not the fact?
> A. He takes charge of the car.
> Q. And remains in charge until it comes over into Missouri, around to 10th and Main and back through the tunnel, back over to Central Avenue again—to *18th and Central*, Kansas City, Kansas?
> A. *That is true.*
> Q. And the Metropolitan Street Railway Company conductor has *exclusive* control over them during that time?

A. Yes, sir.
Q. He collects the fares?
A. Yes, sir" (Record pp. 32-33).

On this same subject as to the place where the cars of plaintiff in error were transferred to the tracks of the Metropolitan, the defendant in error, McAdow, also testified as follows:

"Q. Now, when you ran a passenger car you would go to *18th and Central*—you knew that was the *end* of the Western line?
A. *Yes, sir;* the Kansas City Western.
Q. The Metropolitan conductor came on the car at that time?
A. *Yes, sir;* at *18th and Central.*
Q. And then you came on the *Metropolitan* tracks, off of the Western tracks and the Metropolitan conductor was there and came on the car and took charge of it?
A. *Yes, sir*" (Record pp. 56-57).

From the above uncontradicted evidence, it will be seen that the statement in brief of defendant in error, that the cars of plaintiff in error "went upon the *tracks* of the *Metropolitan*, at *Chelsea Junction*," was erroneous on a question of fact in the case, which becomes material in considering the question as to *when* and at *what point*, the train despatcher *ceased* to have any *control over*, or *direct* the *operation* of the cars of plaintiff in error.

On this same question as to *where* or *at what point*, the Metropolitan Street Railway Company took charge of the passenger cars of plaintiff in error, the Kansas City Court of Appeals was also in error, as it *assumed* and erroneously decided that the said cars were transferred to the tracks of the Metropolitan Street Railway Company at the *state line*, where said court said "the conductors were changed," which is *not* correct (Record p. 148).

The state line was 2½ miles *east* of 18th *and Central* at Kansas City, *Kansas*, and if the conductors had changed there the train despatcher of plaintiff in error would have had control and direction of the operation of said cars while on the tracks of said Metropolitan Street Railway Company on the streets of Kansas City, *Kansas*.

This erroneous assumption of fact, *may have been a reason* why said court of appeals *decided* that *plaintiff* in error was *operat-*

ing said cars on the tracks of the *Metropolitan Street Railway Company.*

In any event, the said Court of Appeals, as shown by its decision, and defendant in error, as shown by his brief, are both mistaken as to *where* the Metropolitan Street Railway Company took charge of the car, as to the eastern terminus of the track of plaintiff in error; and as to *when* and *where* the train despatcher *ceased* to direct the operation of the cars of plaintiff in error.

Those questions of fact, with many others, may be analyzed by this court, as they related to the running of the cars and *by whom* they were *operated* or *controlled*, when going to and from *Missouri*, in order to determine whether that which purports to be a finding of fact is so interwoven with the Federal question as to be in substance a decision of such question.

THIRD: As to the contention made in brief of defendant in error (p. 8) that *"there was no departure,"* we reply that the Kansas City Court of Appeals, in affirming the judgment rendered in this action states that there *was* a *"departure as claimed by defendant* and that ordinarily it would be a *fatal* error to allow plaintiff to recover judgment on a cause of action different from that originally set up. But under the rules and practice and pleading in this State, defendant *waives* the objection by answering to the merits of the action finally pleaded and going to trial thereon" (Record p. 146).

On the question of waiver of the departure, defendant in error in his brief cites many decisions, which we contend are not applicable to the facts and conditions in case at bar.

Plaintiff in error was brought into the Circuit Court of Jackson County, Missouri, to defend a *common law action* of which said court, being a court of general jurisdiction, had jurisdiction.

Afterwards defendant in error shifted his cause of action to one entirely different and distinct, basing his alleged cause of action on the Federal Statute of 1908, and the Amendment thereto of 1910, which Amendment provided that said court did not have jurisdiction of the action based on said Federal Statute unless plaintiff in error was "doing business" in Missouri. Said plaintiff in error's *first* act, after said petition based on said Federal Statute was filed, was to ask the court to strike it from the files as being a departure from fact to fact, and from law to law.

This right of plaintiff in error, a Kansas corporation, of not being compelled to defend an action under said Federal Statute, in the district of Missouri, where it was not "doing business," and when the alleged cause of action arose *in Kansas*, was a *substantial right* given it by said Amendment of 1910, to said Federal Statute of 1908.

That substantial right being given by the *Federal* Statute could not be taken away by any local procedure or practice existing in the State of Missouri.

It was error for the trial court to overrule said motion to strike the amended petition from the files, and would be fatal, even according to the said decision of the Kansas City Court of Appeals in this case, unless said error was waived by a plea to the merits, after the court overruled said motion. That right given to plaintiff in error by the *federal* statute, was *not* waived according to the decisions of the federal courts which controls such rights, regardless of the rules and decisions of *state* courts.

> "Illegality in a proceeding by which jurisdiction is to be obtained is in *no case waived* by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity; nor is the objection waived when being urged it is overruled, and the defendant is thereby *compelled* to *answer*. He is *not* considered as *abandoning* his *objection because* he *does not submit* to *further proceedings without contestation*. It is *only* where he *pleads* to the *merits* in the *first* instance, *without insisting* upon the *illegality*, that the *objection* is deemed to *be waived*."
>
> (*Harkness* v. *Hyde*, 98 U. S. p. 479).

A foreign corporation by appearing to defend itself in a state court which has jurisdiction of a cause of action, does not thereby render itself liable to be sued on another and different cause of action over which the court does *not* have jurisdiction, especially when such foreign corporation objects at the *earliest opportunity* to the court assuming jurisdiction of such new and different cause of action, which by a federal statute such court is prohibited from assuming.

> "By resorting to a state court to obtain relief from assessment and from personal liability provided by Statute, the plaintiff did not thereby *in any manner* consent, or render himself liable to a judgment against him for any personal

liability. Nor did the counter claim made by the defendant, contractor give any such authority."

(*Dewey* v. *City of Des Moines*, 19 Sup. Ct. Rep. 383, 173 U. S. p. 193.)

In the case last cited, the person, who was made a party defendant, filed a counterclaim against the plaintiff in error, asking for a personal judgment against him.

The State court rendered judgment against plaintiff in error and this court reversed said judgment and held: That plaintiff in error, who was a non-resident "does *not* by resorting to the state courts for relief, thereby *consent*, or *render himself liable*, to a personal judgment against him."

So in case at bar, plaintiff in error, by being brought as a defendant in the Missouri court to defend an action at common law, did not consent or render itself liable to an action based on the Federal Statute of 1908, and an Amendment thereto of 1901, which provided that said court had no authority to adjudicate the rights of plaintiff in error *over its objection* interposed at the *earliest opportunity*.

"A right may be waived or lost by a failure to assert it *at* the *proper time;* but when a party has meant to insist on all the rights it might have, such a result would be unusual and extreme."

(*Atlantic Coast Line Railroad Company* v. *General Burnette* (Decided Nov. 29, 1915) 36 Sup. Ct. Rep. p. 76).

It is well settled that when an act of Congress prescribes in what courts, or districts, a cause of action, *based* on a *federal* statute, shall be brought, that no person, or corporation, can be *compelled* to defend such cause of action in any other court, or district, regardless of state legislation or local procedure of the courts of the various states.

Such substantial rights given by a federal law cannot be lost or "impaired under the name of procedure." (*Atlantic Coast Line Railroad Company* v. *General Burnette*, 36 Sup. Ct. Rep. p. 76, *supra.*)

In most all the states, whenever amendments can be made, the exercise of that right is left largely to the discretion of the trial

court, which may allow an amendment in some instances and not in others.

Likewise one trial court might allow an amendment and another trial court would not. One defendant, even after objecting to the court assuming jurisdiction, by pleading to the merits of a cause of action over which the court did not originally have jurisdiction would be held to waive his rights given by a federal statute and the defendant in the other trial court, which refused to allow an amendment, would be protected in his rights.

The right of plaintiff in error, given to it by the said Amendment of 1910, to the federal statute on which the judgment in case at bar was based, to be exempt from being sued under said statute in a district, or state, in which it was not "doing business," as construed by the federal courts, cannot be destroyed or impaired by favor or discretion of a state court, or the judge thereof in allowing an amendment which shifts from one cause of action to another as in case at bar.

> "The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion." (*Roller* v. *Holly*, 176 U. S. 398, 20 Sup. Ct. Rep. p. 414.)
>
> "The law itself must save the parties' rights and not leave them to the *discretion of courts.*" (*L. & N. R. Co.* v. *Central S. Y. Co.*, 212 U. S. 132, 29 Sup. Ct. Rep. 248.)

In case at bar said federal statute *does* save the rights of the plaintiff in error herein by providing it shall not be *compelled* to defend an action based on said statute, in a state where it is not "doing business," in a sense necessary to give the courts therein jurisdiction, and no state policy, or procedure of local courts, or discretion of such courts, can change the *uniform operation and effect* of said federal statute, or *impair* the rights of plaintiff in error given it by said federal statute.

What would be the effect on the Amendment of 1910 to the Federal Statute of 1906, on which the judgment in case at bar was rendered, if a departure in shifting from a common law cause of action to one based on said federal statute was waived in some states and not waived in others?

In some states a cause of action under the federal statute could be maintained by getting the defendant into court on a common law cause of action, as in case at bar, and then shifting to the fed-

eral statute and rendering judgment against a railroad which was not "doing business" in the state where the said judgment was rendered, and thereby render invalid the provisions of said federal statute fixing the courts and districts in which such actions should be maintained or instituted.

The rights of interstate railroads, as to *where* they can be sued, cannot be left to the various policies of the different states, on the question of departure and *its effect*, or to the discretion of courts in the different states, without rendering invalid and nugatory said provisions of the *federal* statute which *fixes* the *venue*.

FOURTH: In the brief of defendant in error it is stated that plaintiff in error was engaged in interstate commerce, because of its answer filed in *another* action, instituted by the executrix of its train despatcher (Royal) who was killed on said 18th day of December, 1911, in which action plaintiff in error was sued as being an *intra*-state railroad.

At that time the Interstate Commerce Commission had claimed jurisdiction over such matters and the Commerce Court decided that interstate *street railways were* within the purview of the Commerce Act of 1887, consequently plaintiff in error herein, as defendant in the Royal case alleged that it was an interstate railway.

That allegation it *failed* to *prove* and was an erroneous conclusion, and this court afterwards reversed said decision of the Commerce Court and decided that "street railroads are laid in streets as aids to street traffic, for use of single communities, *even* though *divided* by *state lines*, or under *different municipal control*," and are engaged in interstate commerce, "but *not* the commerce which Congress had in mind." (*Omaha & C. B. Ry. Co. v. I. S. Com. Com.*, 230 U. S. 324.)

If said answer in the *Royal* case makes plaintiff in error in case at bar subject to an action under the federal statute in this action, then the *original petition* of *defendant in error* in *this* action, alleging plaintiff in error was an *intra*state railway, and that he (McAdow) was engaged in *intra*state business at the time of his injury, would prevent any recovery in case at bar under the federal statute on which the judgment herein is based.

Neither of such contentions has any merit.

Comments on the Law Cited by Defendant in Error.

FIFTH: As to the claim made in brief of defendant in error that interurban railroads may be liable under the Federal Safety Appliance Act, and are liable under a state of facts as shown by the decision of the court in the case of *Spokane & I. E. Ry.* v. *Campbell*, 217 Fed. 518, cited in said brief of defendant in error, we do not take issue, as that question is not material to the issues of fact or questions of law involved herein.

As to the claim made, in said brief of defendant in error, that the case of *Illinois Central Railroad Company* v. *Nelson*, 212 Fed. 69, is *"exactly this case,"* we do take issue, for both the facts and condition of the pleadings in that case were entirely different, from case at bar, as is shown by statements made by Judge Sanborn in rendering the opinion.

There could have been no departure in that case because, as stated by Judge Sanborn, on page 71:

> "In his *original* complaint Nelson stated a cause of action under *both* the *federal* and the *state* law. The defendant answered * * * denying that plaintiff or defendant was engaged in interstate commerce. * * * Counsel for defendant admitted in open court that the defendant was liable for the injury to the plaintiff unless the latter assumed the risk of his injury or was guilty of contributory negligence. Thereupon counsel for the plaintiff immediately made a motion to amend his complaint by striking out the averment that the plaintiff and the defendant were engaged in interstate commerce at the time of the accident *so that* the *complaint* would *state* a cause of *action under* the *law* of *Iowa alone*. Although the defendant had denied in its answer that neither of the parties was engaged in interstate commerce at the time of the accident, its counsel objected to this amendment. Counsel for the plaintiff then offered to admit that both parties were engaged in interstate commerce if counsel for the defendant would say that he wished to allege that fact. His offer, however, was not accepted, and the court granted his motion to amend."
>
> "The defendant was offered its choice of the *defense* of a cause of action for an admitted liability under the *federal* law *or* under the *state* law."

In said Iowa case, "in his *original* complaint Nelson stated a cause of action under the *state* law" and *judgment was rendered* under *that* cause of action.

In case at bar, judgment was *not* rendered on the cause of action alleged in *original* petition.

In said Iowa case, the complaint, after amendment, stated "a cause of action under the law of *Iowa alone.*"

In case at bar, the petition after amendment complained of, stated a cause of action *only* under the *federal* statute, and not under the cause of action under which plaintiff in error was brought into court.

In said Iowa case, "The defendant was offered its *choice* of the *defense* of a cause of action for an admitted liability under the federal law *or* under the *state law.*"

In case at bar, plaintiff in error was *not* offered its *choice* of a *defense* under federal or state law. On the contrary, it *was deprived* of its right to *defend* itself under the *original* cause of action under which it was taken into said court.

In said Iowa case, the defendant filed an *answer* to the *merits* of the cause of action under the *Iowa* law, on which the judgment was rendered.

In case at bar, plaintiff in error *as soon* as the amended petition on which judgment was rendered, was filed, moved to strike said petition, which shifted the original cause of action, from the files as being a departure from *fact* to *fact, and from law* to *law*, and did *not* file answer, or plead to the *merits*, of the said petition on which the judgment was rendered, until it was *compelled* to do so, after its motion to strike from files, was overruled and excepted to.

Again in the said Iowa case, Judge Sanborn (p. 73), said, "No question of jurisdiction is involved."

In case at bar, the question of the right of the *Missouri* court, to entertain jurisdiction of the action under the federal statute, which provides a foreign corporation must be "doing business" in that district at the time such suit is filed, *was involved.*

Instead of said Iowa case being *"Exactly this case,"* as claimed in brief of defendant in error, the facts and condition of the pleading in said Iowa case were *exactly the opposite*, if we understand the language of Judge Sanborn, in stating the facts of said case.

In said brief of defendant in error, three comparatively late decisions of this court are cited, to-wit:

Central Vermont Railway Co. v. *White*, 238 U. S. 507, L. Ed. 1433.

Brinkmeier v. *Mo. P. Ry. Co.*, 224 U. S. 268, 55 L. Ed. 758.
Texas & N. O. R. Co. v. *Miller*, 221 U. S. 408, 416, 55 L. Ed. 789, 31 Sup. Ct. Rep. 534.

We contend that each and all of said decisions support the contention made by plaintiff in error herein.

There is no question that essential omissions or defects in a declaration or petition of a plaintiff may be "*cured*" by plea of a defendant. Such is a generally recognized rule.

That is exactly what was done in the earliest of said three cases cited by defendant in error, to-wit, *Texas & N. O. R. R. Co.* v. *Miller*, 221 U. S. 408, 416, 31 Sup. Ct. Rep. 534.

In rendering the opinion of the court in said case, Mr. Justice Van Devanter says:

> "The complaint, although stating all the facts essential to a recovery under the statute, was *defective* as a complaint in the Texas court, because it did not conform to the rule prevailing in that state that statutes of other states cannot be noticed judicially, but must be pleaded. More than a year after the death, the defendants *answered* the complaint, and in their *answers* recoginzed the existence of the *statute* upon which the plaintiffs' action was founded, made allegations respecting it, and sought to enforce the one-year limitation therein. * * *
>
> "What the Texas courts really held was that the omission from the complaint of an essential allegation was *cured* by its inclusion in the *answers*. In so holding, they gave effect to a generally recognized rule upon the subject. *United States* v. *Morris*, 10 Wheat. 246, 286, 6 L. Ed. 314, 323. There was *no shifting from one* right of *action* to *another*, as in *Union P. R. Co.* v. *Wyler*, 158 U. S. 285, 39 L. Ed. 983, 15 Sup. Ct. Rep. 877, and *United States* v. *Dalcour*, 203 U. S. 408, 423, 51 L. Ed. 248, 251, 27 Sup. Ct. Rep. 58, *but on* the *contrary*, an *adherence* to the *right originally asserted*. In these circumstances nothing more was involved than a question of pleading and practice in the Texas courts, and its decision by them is final."

What could be plainer than the language used in above decision, that it was simply a case wherein the defendants in answering "cured" defects in the complaint of plaintiff?

In said case, "There was no *shifting* from one right of action to another as in the *U. P. R. Co.* v. *Wyler*, 158 U. S. 285."

In case at bar, there *was* "a *shifting* from one cause of action to another" and of a character more substantial even than in *U. P. R. Co.* v. *Wyler, supra.*

In said case (221 U. S. 408, *supra*), the court held: "but, on the contrary, an adherence to the right *originally asserted.*"

In case at bar, there was *not* "an adherence to the right *originally* asserted."

In said Texas case, there was no departure or "shifting from one right of action to another, as in *U. P. R. Co.* v. *Wyler,*" *supra;* no Federal right was involved, and consequently, the decision of the state court was not subject to review by this court.

However, the said decision does, at least inferentially, hold that the principles of law relative to departure and its effect as laid down by the decision of this court in said case of *U. P. R. Co.* v. *Wyler, supra,* which has been followed for many years by many different courts, are to govern and control actions at law, under a similar state of facts, and are particularly applicable in cases like the one at bar, where the departure is not only one of a most pronounced character, but is one which also involves the jurisdiction of the Missouri Court, and the construction, uniform operation and effect of a *federal* statute, which *fixes* the *venue* for the *trial* of such actions and the *rights* of railroads sued in a district in which they are not "doing business" in a sense held to be necessary by the federal courts.

As to the said case of *Central Vermont Ry. Co.* v. *White,* 238 U. S. 507, *supra,* cited in said brief of defendant in error, the defendant by filing a plea to the *original* declaration, "cured" the defects in said declaration, and thereby it became a matter of state pleading and practice which was binding on this court, practically the same as in the Texas case (221 U. S. 408), decided by Mr. Justice Van Devanter above referred to.

Likewise, the case of *Brinkmeier* v. *Mo. Pac. Ry. Co.,* 224 U. S. 268, 32 Sup. Ct. Rep. 413, cited in said brief of defendant in error, was a Kansas case in which Mr. Justice Van Devanter said:

> "The question first presented for decision is whether the petition stated a cause of action under the original safety appliance act, of March 3, 1893. * * * The Supreme Court of that State held that * * * the petition did *not*

state a cause of action under the act. We think the *ruling was right.* * * * The plaintiff sought to amend his petition by charging that the cars were used in interstate traffic, but the application was denied. * * * Error is assigned upon this ruling, but as it involved only a question of pleading and practice under the laws of the state, it is not subject to review by us. *Texas & N. O. R. Co.* v. *Miller,* 221 U. S. 408."

The Kansas Supreme Court in rendering its decision in said Brinkmeier case decided that the amendment could not be made "under repeated decisions of this court, of which the earliest is *A. T. & S. F. R. Co.* v. *Schroeder,* 56 Kansas, 731."

Said Kansas court, in 56 Kansas, p. 735, *supra,* in referring to the question of departure says:

> "This question has been recently decided by the Supreme Court of the United States in *U. P. Ry. Co.* v. *Wyler,* 158 U. S. 285."

The above decision, of this court in the said Brinkmeier case, shows that the Kansas court *rightfully refused* to allow a plaintiff to shift his common law action to one based on a *federal* statute.

If the decision of the Kansas City Court of Appeals that the amendment, in case at bar, was rightfully *allowed,* is sound, then the matter of departure is left to the discretion of state courts, and their judges with *no uniformity* in the application, *operation* or *effect* of the *federal* statute of 1908, even though we do *not* consider the important amendment of 1910, which fixes the *venue* of cases based on the federal statute.

The said Amendment of 1910, to the Federal Statute of 1908, on which the judgment in case at bar is based, must be considered, and in so doing, it is clearly demonstrated even by the said decisions of this court cited in brief of defendant in error, and herein referred to, that if the question of a departure and its *effect* is left to the policy, or procedure, of the different states, or to the discretion of their courts, then there would be no uniformity in the application of the federal statute involved in case at bar, and the rights of defendants, if foreign corporations, in such actions, to be sued only in the district where the cause of action arose, or in the district in which they were "doing busi-

ness," would be entirely ignored and the said amendment of 1910 to said federal statute of 1908 would be nullified and rendered of no effect.

In rendering the decision of this court in said Brinkmeier case (224 U. S. 268), Mr. Justice Van Devanter in delivering the opinion of the court also said:

> "As the petition did *not* state a cause of action under the safety appliance act, but at most a right of recovery at *common law*, the ruling upon the sufficiency of the evidence did not involve a *Federal* question, and so is not open to re-examination in this court."

In case at bar, however, as the petition on which judgment was rendered *did* state a cause of action under the *federal* statute, the ruling upon the sufficiency of the evidence *does* involve a *Federal* question and is open to re-examination of this court.

For the reasons assigned in its original brief, as well as those given and argued herein, plaintiff in error prays that the judgment of said court of Jackson County, Missouri, and of said Kansas City Court of Appeals may be reversed and held for naught; that it may have judgment granting to it all its just and lawful rights under said federal statute of 1908, and the Amendment thereto of April, 1910, and under the Constitution of the United States and the Fourteenth Amendment thereto; and that it may be restored to all things it has lost by this action because of said judgment of said Circuit Court of Jackson County, Missouri, and the affirmance thereof by said Kansas City Court of Appeals.

Respectfully submitted,

CHARLES F. HUTCHINGS and
MCCABE MOORE,
Attorneys for the Kansas City Western Railway Company, Plaintiff in Error.

INDEX OF AUTHORITIES.

Cases Cited.

STATUTES CITED.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 127.

KANSAS CITY-WESTERN RAILWAY COMPANY,

Plaintiff in Error,

v. No. 24164

GEORGE B. McADOW,

Defendant in Error.

IN ERROR TO THE KANSAS CITY COURT OF APPEALS, STATE OF MISSOURI.

Brief for Defendant in Error.

STATEMENT.

Pleadings—Facts.

Defendant in error, George B. McAdow, instituted a suit in the Circuit Court of Jackson County, Missouri, against plaintiff in error for personal injuries received on December 18th, 1911, while

he was in the employ of plaintiff in error as a motorman, operating an interurban electric railway car. The petition upon which the case was tried is set out on pp. 22, 23 and 24, R. Defendant's answer is set out on pp. 5, 6 and 7, R. The reply, which was a general denial, may be found on p. 7, R.

Plaintiff based his right of action on the Federal Employers' Liability Act. Railway Company denied that it was a common carrier subject to this Act, but claimed it was a railroad engaged in carrying on business wholly within the State of Kansas, and was, therefore, governed by the law of Kansas, and pleaded a portion of the law of Kansas as a defense, entitled:

> "An Act relating to the Liability of Common Carriers by Railroad, to their Employees, in Certain Cases." Session Laws of Kansas, 1911, p. 437-8.

This Act, in passing, we will say is identical in effect with the Federal Employer's Act, and manifestly patterned after that Act. The company's answer contained a further allegation of contributory negligence and assumption of risk, but it abandoned all the issues presented by the answer, except the issue as to whether defendant in error came within the Federal Employers' Liability Act, or the Kansas Act. In other words, the *only litigated point* is whether plaintiff in error is such a railroad as is embraced within the provisions of the Federal Employer's Liability Act, or is a railroad operating wholly within the state of Kansas, and embraced within the provisions of the law of Kansas.

Plaintiff in error is an interurban railway company, operating a line of railway between Kansas City, Missouri, and Leavenworth, Kansas, about twenty-five miles in length, transporting passengers, freight, express and mail between said points, the cars moving over defendant's own rails and roadbed extending from Leavenworth, Kansas, to Kansas City, Kansas, and thence over the tracks of the Metropolitan Street Railway Company, (which then was and

now is managed by receivers appointed by the Federal Court for the Western Division of Missouri), to Tenth and Main streets, in Kansas City, Missouri. The defendant ran cars on an hourly schedule from 5:30 a. m. to 11 p. m.; Tenth and Main streets, Kansas City, Missouri, was one of the stations named on the time card furnished by defendant to its employees (R., 38, 40, 42), and a car of defendants was due at said point on the even hour every day. All trains, both passenger and freight, were dispatched from Wolcott, Kansas, a central station on defendant's line of railway, by means of a telephone, the dispatcher giving his orders and having them repeated back to him by the motorman and conductor (R., 39).

McAdow was, at the time of his injury, December 18th, 1913, a motorman in the employ of plaintiff in error, and had been such since February, 1906 (R., 38), in both passenger and freight service. His first order on taking his car out the morning of the injury, at Chelsea Junction, which was the point in Kansas City, Kansas, where the defendant's cars went upon the tracks of the Metropolitan, was, "Go to Missouri," which meant Tenth and Main streets, in Kansas City, Missouri (R., 45). He thereupon proceeded to operate defendant's car to Tenth and Main streets, in Kansas City, Missouri, where passengers bound for Leavenworth, Kansas, and other points on defendant's line of railway in Kansas, boarded his car (R., 45). From there he proceeded on his return trip to Leavenworth, Kansas, from Main street, in Kansas City, Missouri. At Eighteenth and Central streets, in Kansas City, Kansas, he received the following order: "Meet one car at Grandview and report at Bethel" (R., 47). Bethel, Kansas, is about four miles north of Grandview. At Bethel the following order was given: "Come to Wolcott and come as quick as you can." (R., 47.) It was a very foggy morning and he could only see thirty or forty feet ahead of him at the time of the collision (R., 50). While going down a hill near Marshall Creek, a station a short distance

south of Wolcott, and while running at a rate of speed from forty to fifty miles per hour, his car collided head-on with one of defendant's passenger cars (Car No. 9) moving in an opposite direction, bound for Kansas City, Missouri (R., 50). There was a rule of defendant's company that cars should exchange slips at passing points. The order for car No. 9 (southbound car) which collided with car No. 21 (McAdow's car) northbound, was, "Meet one car at Wolcott, two at Chelsea, and go to K. C."; and, according to all the testimony, the southbound car No. 9 should not have gone out of Wolcott until northbound car No. 21 had arrived and said passing slips had been exchanged (testimony of General Manager Richardson, R., 92-93). McAdow was running according to his orders at the time of the collision (R., 48). **There is no evidence whatever that McAdow was in any way responsible for the collision. Indeed, plaintiff in error admits it by not tendering any instruction submitting this issue.**

There is a conflict in the testimony as to whether the cars of the defendant company were operated over the Metropolitan Street Railway Company's tracks under a written or oral agreement, but under either arrangement it is conceded that the defendant company received, in addition to its own fare from Leavenworth, Kansas, to Kansas City, Kansas, or *vice versa*, 20 per cent of the 5-cent fare collected from passengers while its cars were on the Metropolitan Street Railway Company's track (R., 106). (Testimony of witness John M. Egan, general manager for the receivers of the Metropolitan Street Railway Company, R., 31, and testimony of C. F. Cole, auditor of defendant, R., 101.) It is also a conceded fact that the defendant's cars when on the Metropolitan's tracks were operated by the defendant's motormen, and defendant's conductor remained on the car, but a Metropolitan conductor collected the 5-cent fare exacted of passengers remaining in the suburban car when the same came upon the tracks of the Metropolitan (R., 31).

This traffic contract between the Metropolitan and the railway company, introduced at the trial by defendant, provides that the Railway Company shall be responsible for the negligence of its own servants while they are operating cars on the Metropolitan's tracks (R., 105); it also provided that if the Metropolitan would permit the Railway Company to use a certain viaduct, thereby giving them a more direct route from Kansas into Kansas City, Missouri, that the Railway Company would bear half the expense of putting in curved tracks, and special works necessary to enable its cars to be turned from such tracks, etc. (R., 111.) It also was provided in said contract that defendant would permit the Metropolitan to take on passengers on the cars while on its tracks, except when its cars were crowded, and *then only suburban passengers* were to be permitted to ride upon it (R., 106).

The Railway Company's car was 55 feet long, capable of running 45 or 50 miles per hour. It was divided into two compartments and contained a large stove for heating purposes (R., 49).

Mr. Egan, general manager for the receivers of the Metropolitan Street Railway Company, testified that he did not hire Mr. McAdow, nor had any right to discharge him, and that he was not one of the men employed by his company; that he did not so recognize him, and that he did not pay his wages (R., 30-31). McAdow testified he was hired and paid by the Kansas City-Western Railroad Company (R., 41).

The statement of facts in the opinion of the Kansas City Court of Appeals is so accurate that it is not even challenged by the plaintiff in error.

The night dispatcher of the railway company, having been relieved of his duties, was riding upon the car No. 9 when it collided with McAdow's car, No. 21, and was killed. The defendant in the case of *Charlotte E. Royal, Executrix*, v. *The Kansas City Western Railway Company*, filed an answer in which

it expressly admitted that on the *very day* of this collision the defendant was engaged in interstate commerce, and its employees were likewise engaged in working for it in the carrying on of such commerce. The following is a portion of the answer introduced in evidence:

"Mr. Atwood: I offer in evidence this Exhibit '1,' being the answer filed in case No. 67545, *Charlotte E. Royal, Executrix, Plaintiff*, v. *The Kansas City-Western Railway Company, Defendant.*

Mr. Cowherd: I think part of the answer is incompetent.

Mr. Atwood: I will read, beginning at the middle of the sixth line from the top of page 3 of the answer of the defendant Kansas City-Western Railway Company, in that case.

Said portion of said answer is as follows:

'That at all said times prior to and on the said *18th day of December, A. D. 1911*, and at the time of the death of said plaintiff's husband, Grandville V. Royal, he was in defendant's employ and by virtue of being an employee of said defendant at the time of his death was riding on said car No. 9 of said defendant, not as a passenger but as such employee, on transportation furnished him because of such employment, **while said car was carrying for hire, from the state of Kansas into the state of Missouri, other persons who were then and there interstate passengers, being transported from the state of Kansas into the state of Missouri; that said car was then and there an instrument of defendant in carrying on its business as a common carrier by railroad of interstate commerce.**

Said defendant further alleges that if any cause of action exists against it in favor of said plaintiff, on account of the death of said Grandville V. Royal, which defendant denies, such cause of action accrued to plaintiff solely under and by virtue of the Act of Congress of the United States, entitled: "An Act relating to the Liability of Common Carriers by Railroad to their Employees in certain cases," approved April 22, 1908, and the amendment thereto approved April 5th, 1910; that said plaintiff has no right to and cannot maintain this action under any statute of the State of Kansas.

Sixth. The said defendant further alleges that the death of said Grandville V. Royal was caused solely or primarily by his own negligence, co-operating with the negligence of one Lowe, a fellow-servant of said Grandville V. Royal, as hereinafter alleged.' "

The evidence is uncontradicted that prior to the injury to plaintiff he worked regularly at his employment and was in good health, but his injuries received in this collision were so severe as to make him an invalid for life. The verdict was only for $7,500.00. The Railway Company did not contend the verdict was excessive.

BRIEF OF ARGUMENT.

Counsel for plaintiff in error specify fourteen distinct errors upon which is sought a reversal of this cause. Under their argument they state that these errors are divided into "five separate groups." Notwithstanding counsel urge fourteen errors, in groups of five, we assert there are, on final analysis, only two propositions contained in these assignments of error. They are:

First: That the second amended petition upon which the case was tried was a departure from the original petition in the cause.

Second: That the Railway Company was not engaged in interstate commerce at the time of the injury to McAdow.

Now as to the first proposition, we insist that there was no departure, and that if such a question was ever in the case, it was a matter of state practice and procedure and involved no federal question. The original petition is set out in Record, p. 10. The second amended petition is set out in Record, p. 22. An examination will show no substantial difference in these petitions. The first paragraph of the original petition alleges facts sufficient to bring the cause of action under the Federal Employer's Act; the second amended petition merely makes more definite and certain the issue, charges the same negligent acts, same injuries, and prays for the same relief. The amendment was made to satisfy the Railway Company's motion to make our original petition more definite and certain (see R., 13).

By reference to this motion it will be seen the Railway Company did not then take the position that it does now, that the original petition was an action based solely on the common law. The Railway Company chose to answer the second amended petition

and go to trial of the facts therein; by so doing they waived the departure, if any, in fact, existed. This doctrine is settled by a long line of Missouri decisions, without a contrary holding:

Blanchard v. *Dorman*, 236, Mo., 416, l. c., 443;
Liese v. *Meyer*, 143 Mo., 547, l. c., 556;
White v. *Railroad*, 202 Mo., 539, l. c., 561;
Walker v. *Railroad*, 193 Mo., 543, l. c., 477;
McMurray v. *Railroad*, 225 Mo., 272, l. c., 300;
Dakan v. *Chase & Sons Mercantile Co.*, 197 Mo., 238, l. c., 270;
Ewing v. *Vernon County*, 217 Mo., 681, l. c., 685;
Cook v. *Globe Printing Co.*, 227 Mo., 471, l. c., 525;
Bick v. *Vaughn*, 140 Mo., App., 595, l. c., 691;
Stewart & Jackson v. *Van Horn*, 91 Mo., App., 647, l. c., 655;
Jones v. *Traction Co.*, 137 Mo., App., 409, l. c., 411;
Bowman v. *Shelton*, 158 S. W., 405, l. c., 406;
Fortney v. *Marblehead Lime Co.*, 158 S. W., 859, l. c., 860;
Borklolski v. *Janicke*, 157 S. W., 125, l. c., 126;
Scovil v. *Glasner*, 79 Mo., 449;
Scanteer v. *Leveridge*, 103 Mo., 615;
Holt Co. v. *Cannon*, 114 Mo., 514;
Spurlvon v. *Railroad*, 93 Mo., 530, 537.

There was in fact no departure:

Missouri, Kansas & Texas Ry. Co., v. *Wulf*, 226 U. S., 570, 57 L. Ed., 355;
Midland Valley R. R. Co. v. *Ennis*, 159 S. W., 214, l. c., 217;
Decosta v. *Southern Pacific Ry. Co.*, 100 C. C. A., 313;

Hudson v. *Southwest Missouri R. R. Co.*, 159 S. W., 9, l. c., 15;

Wabash Ry. v. *Hayes*, 234 U. S., 36, 58 L. Ed., 1226;

Ill. Cen. Ry. v. *Nelson*, 212 Fed., 669 (8th Ct.).

This court will not review questions of state procedure:

Central Vermont Railway Co. v. *White*, ~~United States~~ 238 U. S., 507, 59 L. Ed. 1433;

Brinkmeier v. *Mo. P. Ry. Co.*, 224 U. S., 268, 55 L. Ed., 758;

Texas & No. O. R. Co. v. *Miller*, 221 U. S., 408, 416, 55 L. Ed., 789, 31 Sup. Ct. Rep., 534.

In the Central Vermont R. Co. case, *supra*, upon this very point, this court, speaking through Mr. Justice Lamar says:

"There are, however, a series of assignments in this record which must be disposed of in conformity with the general principle that matters affecting the remedy are to be governed by the law of the forum. They are all based on the fact that, while the railway company had lines running through Massachusetts and Vermont into Canada, the declaration *contained no allegation that White was engaged in interstate commerce at the time of the collision.* The company made this the ground of a plea in bar. The administratrix thereupon filed a replication admitting that the deceased was engaged in such commerce at the time of his death. The company demurred to the replication on the ground that it was a *departure from the cause of action under the state law*, and the assertion of a *new cause of action* under the Federal Employers' Liability Law. This demurrer was overruled and after verdict the defendant made the same facts the basis of a motion in arrest of judgment.

The evidence showed a liability under the Employers' Liability Act, and without stopping to discuss whether, on general principles, the motion should not have been overruled because the declaration was amendable to conform to the

proof (*Grand Trunk Western R. Co.* v. *Lindsay*, 233 U. S., 48, 58 L. Ed., 842, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914 C. 168; *Toledo, St. L. & W. R. Co.* v. *Slavin*, 236 U. S., 454, *ante*, 306, 35 Sup. Ct. Rep., 306), *it is sufficient to say that the supreme court of the state held that the defect in the original declaration had been cured by the charge in the plea, and the admission of the replication that White was employed in interstate commerce. That decision on a matter of state pleading and practice is binding on this court.*"

For the most part, the errors assigned by plaintiff in error relate to admissibility of evidence, rulings, matters of pleading in the state court, involving no federal question In *Central Vt. R. Co.* v. *White*, *supra*, this court speaking through Mr. Justice Lamar, said:

> "The case was brought here on a record containing so many assignments, covering 18 printed pages, as to make it proper to repeat the ruling in *Phillips & C. Constr. Co.* v. *Seymour*, 91 U. S., 648, 23 L. Ed., 342, that the 'practice of filing a large number of assignments cannot be approved. It perverts the purpose sought to be subserved by the rule requiring any assignments.' 'It points to nothing and thwarts the purpose of the rule.' (*Chicago G. W. R. Co.* v. *McDonough*, 88 C. C. A., 517, 161 Fed., 659), which was intended to present to the court a clear and concise statement of material points on which the plaintiff in error intends to rely. Some of the assignments in the present case relate to *matters of pleading; others to the admissibility of evidence, to the sufficiency of exceptions*, and to *various rulings* of the trial court which *involve no construction* of the Employers' Liability Act, and which, therefore, cannot be considered on a writ of error from a state court. *Seaboard Air Line R. Co.* v. *Duvall*, 225 U. S., 477, 486, 56 L. Ed., 1171, 1175, 32 Sup. Ct. Rep., 790."

Under the evidence in this case there can be no doubt but that the Federal Employers' Liability Act applies in this case.

Mondon v. *N. Y., N. H. & H. R. R. Co.*, 223 U. S., 1, 56 L. Ed. 327;

Pedersen v. *D. L. & W. R. R.*, 229 U. S., 146, 57 L. Ed., 1125;

St. L., S. F., & T. R. Co. v. *Seale*, 229 U. S., 156, 57 L. Ed., 1129;

North Carolina R. R. Co. v. *Zackery*, 232 U. S., 248, 58 L. Ed., 591;

United States v. *Colorado R. R. Co.*, 157 L. Ed., 321, 342;

Central Ry. Co. of N. J. v. *Colasurdo*, 192 Fed., 901;

Northern Pacific R. Co., 117 C. C .A., 237;

Bennett v. *U. S.*, 114 C. C. A., 403;

Glouchester Ferry Co. v. *Pennsylvania*, 114 U. S., 196-203, 29 L. Ed., 158;

Covington Bridge Co. v. *Kentucky*, 154 U. S., 204, 217, 38 L. Ed., 962;

The Passaic, 190 Fed., 644.

And interurban railroads are clearly embraced within the Act:

Omaha & C. B. Railway Co. v. *I. C. Com. Comm.*, 230 U. S., p. 324, 57 Law Ed., 1501, 33 Sup. Ct. Rep., p. 89;

Spokane & I. E. Ro. Co. v. *Campbell*, 217 Fed (C. C. A., 8th Circuit) 518, l. c., 521-524;

Washington Ry. Co. v. *Downey*, 40 App. cases (D. C.) 147.

In the *Omaha & C. B.* v. *I. C. C.* case, (*supra*) this court, speaking through Mr. Justice Lamar, virtually holds that interurban electric lines are such roads as are comprehended by the Act; after deciding that street railways proper are not railroads within the meaning of the Interstate Commerce Act of February 14th,

1887, there has been exception made of electric interurban roads such as in this case:

> "But is is said that since 1887, when the Act was passed, a new type of interurban railroad has been developed which, with electricity as a *motive power*, uses *larger cars*, and runs *through the county from town to town*, enabling the *carrier to haul passengers, freight express*, and the mail for long distances at high speed. *We are not dealing with such a case*, but with a company chartered as a street railroad doing a street railroad business and hauling no freight. The case was heard on demurrer, with the opinion of the Commission treated as a part of the record. It indicates that at some points the line is on private property, but where this is and to how great an extent does not appear. Indeed, the record does not show that electricity was used as a motive power, though, in the light of modern methods, that may possibly be assumed. But it affirmatively appears that the company was chartered as a street railroad, and hauls no freight, and is doing only a business appropriate to a street railroad."

In *Spokane, etc. v. Campbell*, (cited *supra*), the Circuit Court for the 8th Ct., speaking through Mr. Justice Wolverton, decided that interurban electric railroad lines were comprehended within the Federal Safety Appliance Act, and also (l. c., 524) that in that particular case, the electric interurban railroad came within the purview of the Federal Employer's Liability Act:

> "There can be no doubt that when the primary act was passed (Safety Appliance Act of Congress, Mar. 2, 1893), electrically propelled trains were not within the legislative mind, and where 'locomotive engine' occurs reference was had to a steam-propelled engine. And likewise when 'engineer' is spoken of, it had relation to a person in charge of a steam-propelled locomotive. But this does not signify that other locomotive or motor engines, and that persons driving other motor cars, may not come within the scope and intendment of the Act. The purpose of the legislature was to provide, among other things, for a more efficient and effective way of handling trains in interstate commerce, so that the speed and movement of the trains might be regulated and

controlled, and, when desired and in cases of emergency, readily brought to a stop, all from the engine and by the one person in charge of it, thereby to lessen the danger to employes and the public incident to the operation of railroads.

The electric railroad has since come into very general use, with its driving engines called motors, and its employes in charge of the engines are called motormen or enginemen. These railroads, notwithstanding, are common carriers of property and persons, the same as steam railroads, and have employees and come into relation with the public in the same way, the only essential difference being that electricity has taken the place of steam as a propelling agency or force, with differently contrived engines, suited to the harnessing of the propelling agency to the use desired, so that the broad purposes of the legislature applies as completely to the one kind of railroad as to the other. In a narrower sense, a locomotive engine is spoken of as an engine propelled by steam; but when the statute, as the amendment does, extends the provisions of the act to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce, and to all other locomotives, tenders, cars and similar vehicles, it broadens the significance so as, without question, to include motors electrically propelled, used upon railroads engaged in interstate commerce. So, also, the original Act, with its amendment, includes the operators of such engines, whether called engineeers or motormen. We think the statute is broad enough to require that electrically propelled engines and trains engaged in interstate commerce, as well as steam-propelled engines and trains, shall be equipped with air brakes for their efficient operation and control."

The law of the state of Kansas applicable to railroad employees, pleaded by plaintiff in error in its answer being *identical in effect* with the Federal Employers' Liability Act, the question of whether the defendant in error was engaged in intrastate or interstate commerce is immaterial.

Chicago & Northwestern Ry. Co. v. *William H. Gray*, 237 U. S., 399, L. Ed. 59, L. Ed. 1018;

Illinois Central R. Co. v. *Nelson*, 212 Fed., 69, l. c. 72.

In the last named case, as in this case, an amendment to the petition was allowed. The defendant assigned error. The Circuit Court of Appeals, Eighth Circuit, speaking through Judge Sanborn, said:

> "Not only this, but if there had been error in these rulings it would not have been fatal to this trial, because defendant's liability for its negligence was admitted, there was no substantial evidence of the plaintiff's assumption of the risk of his injury, or of his contributory negligence, the same person, the plaintiff, was entitled to recover whether his cause of action arose under the federal law or under the state law, the only question remaining at issue was the amount of recoverable damages, and the rules for the measurement of these damages were identical under the federal law and under the state law, so that it appeared beyond doubt from the pleadings and the evidence that an error in these rulings did not prejudice and could not have prejudiced the defendant, and error without prejudice is no ground for reversal. Where, in an action against a common carrier for a negligent injury, the same party, if anyone, is entitled to recover on the alleged cause of action and the rules of law governing the trial of the issues in the case are the same under the Federal Employers' Liability Act and under the state laws, and no question of jurisdiction is involved, it is immaterial whether the action, trial, and judgment are had under the federal law or under the state law.
>
> Because there was no substantial evidence to sustain a verdict that the plaintiff assumed the risk of his injury or that he was guilty of contributory negligence, this record satisfies beyond doubt that the alleged errors in the rulings of the court on these subjects, as well as on matters relating to the question whether the cause of action arose under the federal law or under the state law, did not prejudice and could not have prejudiced the defendant, and they are accordingly dismissed without further discussion, whether they were made *upon questions regarding the pleadings*, upon the *admission or exclusion* of evidence, *in the charge of the court, or in its refusal of requested instructions.*"

Exactly this case. No question here of assumption of risk or contributory negligence. Negligence of the railway company ad-

mitted. State and federal law on subject identical. What right, state or federal or at common law, has been denied the plaintiff in error?

For the convenience of the court we set out the Kansas Employers' Liability Act of 1911 in its entirety, Session Laws of Kansas, 1911, page 437:

"Section 1. That every company, corporation, receiver or other person operating any railroad in this state shall be liable in damages to any person suffering injury while he is employed by such carrier operating such railroad or in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow and children, or husband and children, or children or mother or father of the deceased, and if none, then the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier; or by reason of any insufficiency of clearance of obstructions, of strength of road bed and tracks or structure, of machinery and equipment, of lights and signals, or rules and regulations and of number of employees to perform the particular duties with safety to themselves and their co-employees, or of any other insufficiency, or by reason of any defect which defect is due to the negligence of said employer, its officers, agents, servants or other employees, in its cars, engines, motors, appliances, machinery, track, roadbed, boats, works, wharves or other equipment.

Section 2. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee, provided, that no employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier, its officers, agents, servants, or other employees of any federal or state statute en-

acted for the safety of employees contributed to the injury or death of such employee.

Section 3. That any action brought against any common carrier, under or by virtue of any of the provisions of this act, to recover damages for injuries to, or the death of any of its employees, such employees shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier, its officers, agents, servants, or other employees of any federal or state statute enacted for the safety of employees contributed to the injury or death of such employee.

Section 4. That any contract, rule, regulation or devise whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void; provided, that in any action brought against any common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum contributed or paid to any insurance, relief, benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

Section 5. That any right of action given by this act to a person suffering injury shall survive to his or her personal representatives, for the benefit of those entitled to recover under this act, but in such cases there shall be only one recovery for the same injury.

Sec. 6. That all acts or parts of acts so far as the same are in conflict herewith are hereby repealed.

Sec. 7. This act shall be in force and take effect from and after its publication in the statute book."

This court accepts the findings of the Kansas City Court of Appeals upon the question of facts as final, and under those findings there is no escape for plaintiff in error for liability in this case.

Waters-Pierce Oil Co. v. *Texas*, 212 U. S., 97;
King v. *West Virginia*, 216 U. S., 100;
Chrisman v. *Miller*, 197 U. S., 319.

It is apparent this writ of error was sued out merely for delay, and we ask that damages provided for by Rule 23 of this court be allowed as has been done in cases where the offense was not so great.

Southern Railway Co. v. *Gadd*, 233 U. S., 572, 58 Law Ed., 1099.

In conclusion we earnestly insist that the judgment of the Kansas City Court of Appeals is manifestly right and should be affirmed.

Respectfully submitted,

JOHN H. ATWOOD and
OSCAR S. HILL,
Attorneys for Defendant in Error.

KANSAS CITY WESTERN RAILWAY COMPANY *v.* McADOW.

ERROR TO THE KANSAS CITY COURT OF APPEALS, STATE OF MISSOURI.

No. 127. Submitted January 18, 1916.—Decided January 31, 1916.

If the declaration on which a case is tried brings it under the Employers' Liability Act, the fact that the particular allegation showing that plaintiff was engaged in interstate commerce appeared as an amendment does not raise a Federal question.

Actions of tort are transitory.

The law governing the situation in an action in a state court under the Employers' Liability Act is equally the law of the State whether derived from Congress or the state legislature and must be noticed by the court.

An electric railway from Leavenworth, Kansas, to Kansas City, Kansas, with a traffic agreement with a street railway company operating in Kansas City, Missouri, *held* to be a railroad within the Act to Regulate Commerce. *United States* v. *Balt. & Ohio S. W. R. R.*, 226 U. S. 14. *Omaha Street Ry.* v. *Int. Comm. Comm.*, 230 U. S. 324, distinguished.

The statute of Kansas is so similar to the Federal Employers' Liability Act that the liability of the employer is not affected by the question of which governs the case, and it is under such circumstances unnecessary to determine which law applies.

THE facts, which involve the validity of a verdict in an action for personal injuries and the application of the Federal Employers' Liability Act, are stated in the opinion.

Mr. Charles F. Hutchings and *Mr. McCabe Moore* for plaintiff in error.

Mr. John H. Atwood and *Mr. Oscar S. Hill* for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action for personal injuries brought by the defendant in error against the plaintiff in error in whose employ he was. The original petition alleged that the defendant operated a line of electric railway extending from Leavenworth, Kansas, through Wolcott and Kansas City in the same State into Kansas City, Missouri, that the plaintiff was a motorman upon a car on the line and was injured in Kansas by a collision due to the defendant's negligence. An amendment was allowed alleging that the

plaintiff was injured on a trip from Kansas City, Missouri, to Leavenworth, with further details, and that the defendant's negligent acts were in violation of the act of Congress controlling such matters when the parties were engaged in commerce among the States. The defendant was a Kansas corporation having an electric railway from Leavenworth into Kansas City, Kansas. It had a traffic agreement with the Metropolitan Street Railway Company operating street railways in Kansas City, Missouri, by which the latter was to receive the cars of the former carrying passengers and freight and move them through designated streets in Missouri and back to Kansas; each party to be liable for damage due to its negligence during this part of the transit, and the fares and freight money to be divided in certain proportions. By a later agreement the route was modified and it was provided that the defendant should pay the trainmen's wages during the movement in Missouri but that they should be under the exclusive control of the Metropolitan Company and as between said companies, should in all respects be regarded for the time being as its employés. There was evidence that in fact at the time of the accident the only control exercised by the Missouri Company was to put a conductor upon the car to receive the fares, that while in Missouri it received its orders from the Kansas side, and that the Company was in the hands of receivers who seem not to have recognized the contract. The plaintiff got a verdict which was sustained. The errors assigned are, in substance, that the amendment expressly bringing the case under the act of Congress ought not to have been allowed; that the act does not apply to electric roads and that, if it does, the defendant was not engaged in commerce among the States, or at least was not if the contract between the companies governed the movement of the car.

As to the first it would be enough to say that if the

declaration on which the case was tried brought it under the Act, the fact that it appeared as an amendment to one that alleged the same facts with the exception of the plaintiff's coming from beyond the State raises no question under the laws of the United States. *Central Vermont Ry.* v. *White*, 238 U. S. 507, 513. *Brinkmeier* v. *Mo. Pac. Ry.*, 224 U. S. 268, 270. The state court sustained the amendment on the ground of waiver, but if it had held it allowable as a matter of course, no Federal right would have been infringed. *Wabash R. R.* v. *Hayes*, 234 U. S. 86, 90. It is said that by the amendment it gave a jurisdiction to the Missouri court that otherwise it would not have had under the Employers' Liability Act of April 5, 1910, c. 143; 36 Stat. 291. But actions of tort are transitory and the argument based on the act of 1910 would have no application unless the defendant was engaged in business governed by that act. The argument would be that if so engaged then, under the statute, the interstate road could not be sued in a state court unless it was doing business in that State. We express no assent to it, but if sound it would afford no ground for objecting to the amendment; and no question of jurisdiction was raised. The amendment introduced no fact inconsistent with those first alleged and it was unnecessary when the facts were stated to invoke the act of Congress in terms. The law governing the situation is equally the law of the State whether derived from Congress or the state legislature, and must be noticed by the courts. *Grand Trunk Western Ry.* v. *Lindsay*, 233 U. S. 42, 48. *Mondou* v. *New York, New Haven & Hartford R. R.*, 223 U. S. 1, 57.

The defendant's road appears to be of the class of the Traction Company that was before the court in *United States* v. *Baltimore & Ohio Southwestern R. R.*, 226 U. S. 14, and that was excepted from the decision in *Omaha & Council Bluffs Street Ry.* v. *Interstate Commerce Commission*, 230 U. S. 324, 337. Such roads have been held

to be within the act of Congress. *Spokane & I. E. R. R.* v. *Campbell*, 217 Fed. Rep. 518. See Act of June 18, 1910, c. 309, § 12; 36 Stat. 539, 552. So again many cases have intimated that the technical considerations by which the defendant seeks to establish that it was not engaged in commerce among the States are not final. *Penna. R. R.* v. *Clark Brothers Mining Co.*, 238 U. S. 456, 467. *Savage* v. *Jones*, 225 U. S. 501, 520. *Swift* v. *United States*, 196 U. S. 375, 398. But these questions really are immaterial here since the Kansas statute is so similar to that of the United States that the liability of the defendant does not appear to be affected by the question which of them governed the case. In such circumstances it is unnecessary to decide which law applied. *Chicago & Northwestern Ry.* v. *Gray*, 237 U. S. 399.

Judgment affirmed.